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QUESTION OF THE REALIZATION IN ALL COUNTRIES OF THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS CONTAINED IN THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND IN THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, AND STUDY OF SPECIAL PROBLEMS WHICH THE DEVELOPING COUNTRIES FACE IN THEIR EFFORTS TO ACHIEVE THESE HUMAN RIGHTS, INCLUDING: PROBLEMS RELATED TO THE RIGHT TO ENJOY AN ADEQUATE STANDARD OF LIVING; FOREIGN DEBT, ECONOMIC ADJUSTMENT POLICIES AND THEIR EFFECTS ON THE FULL ENJOYMENT OF HUMAN RIGHTS AND, IN PARTICULAR, ON THE IMPLEMENTATION OF THE DECLARATION ON THE RIGHT TO DEVELOPMENT

The right of everyone to own property alone as well as in association with others

Completed final report submitted by Mr. Luis Valencia Rodríguez, independent Expert

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INTRODUCTION

A. Origin of the study

1. At its forty-fifth session, the General Assembly, in its resolution 45/98 of 14 December 1990, having taken note of the report of the Secretary-General (A/45/523) on the subject, requested "the Commission on Human Rights, while addressing the question of the realization in all countries of the economic, social and cultural rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, to consider the means whereby and the degree to which respect for the right to own property alone as well as in association with others contributes to the development of individual liberty and initiative, which serve to foster, strengthen and enhance the exercise of their human rights and fundamental freedoms".

2. The Commission on Human Rights, at its forty-seventh session, adopted resolution 1991/19 of 1 March 1991 in which it, inter alia, requested its Chairman to entrust an independent Expert with the task of preparing a study, within the existing resources, on the means whereby and the degree to which respect for the right to own property alone as well as in association with others contributed to the development of individual liberty and initiative, which served to foster, strengthen and enhance the exercise of other human rights and fundamental freedoms, and requested that a preliminary report be submitted to the Commission at its forty-eighth session and the final report at its forty-ninth session. The Economic and Social Council endorsed the Commission's request. On 29 August 1991, the Chairman appointed Mr. Luis Valencia Rodríquez (Ecuador) as the independent Expert to carry out the task. The preliminary report submitted by the independent Expert and considered by the Commission was contained in document E/CN.4/1992/9.

3. The preliminary report dealt, inter alia, with conceptual issues (paras. 151-154), and with methodological and institutional aspects of this right. Measures taken by the United Nations bodies were also elucidated.

4. The Commission on Human Rights, in its resolution 1992/21 of 28 February 1992, requested the Secretary-General to provide all necessary assistance to the independent Expert and to transmit his preliminary report to all Member States and interested intergovernmental and non-governmental organizations, requesting them to submit their comments so that they could be taken into account in his work.

5. The small number of replies received and the comparatively small amount of substantive information contained therein, in particular on conceptual issues, caused the independent Expert, in preparing the conceptual part of his report, to refer mainly to the relevant provisions of the international instruments and resolutions adopted by the United Nations bodies, which served as the main sources for the report.

6. Nevertheless, the replies sent by Governments and intergovernmental organizations have also been very valuable sources of information. In the light of the fact mentioned above, replies by Governments and intergovernmental and non-governmental organizations submitted reports of the

Secretary-General were also taken into account. Account has also been taken of documents prepared by United Nations bodies and regional organizations in the economic field and related to the issues dealt with in this report. The independent Expert has studied and used the literature available on this question.

7. The Commission on Human Rights, at its forty-ninth session, taking note of the report of the independent expert, adopted resolution 1993/21 of 4 March 1993 in which it, inter alia, decided to renew the mandate of the independent expert for one year so that he might complete his report using the observations and comments submitted by governments and intergovernmental and non-governmental organizations which could not be included owing to the time when they were received.*

8. In the light of the foregoing, the present completed final report summarizes the main issues of the 1993 report. It also includes the observations and comments submitted by governments received after that report had been prepared. The analytical parts of the 1993 report are not repeated in extenso. It is suggested therefore that readers who are interested in the details consult the 1993 report.

9. The present study, like the previous one, has been broken down into five chapters and has been prepared in accordance with the outlines set out in paragraphs 51-56 of the 1992 report. Chapter I deals with specific features of the right to own property, its place in the hierarchy of all human rights, its significance in fostering widespread enjoyment of other basic human rights. Chapter II considers the significance of the right to own property as a contribution to securing peace and the goals of economic and social development enshrined in the Charter of the United Nations and its relationship to ensuring the full and free participation of individuals in the economic and social systems of States. Chapter III analyses the legal protection of the right to own property as a human right and its implementation. Chapter IV sets out the national and international policies, national legislation and practical measures in the field. Chapter V describes the restrictions and limitations in the exercise of this right. Lastly, attention is drawn to the conclusions and recommendations of the independent expert based on the study.

B. Addressing the question from an historical point of view

10. The traditional religious, at least Christian, conception of property held that God had given man dominium over the earth, its fruit and its creatures to use. Writing on "origin and development of the right of private ownership". Hugo Grotius stated that:

> "Soon after the creation of the world, and a second time after the Flood, God conferred upon the human race a general right over things of a lower nature. 'All things', as Justin says, 'were the common and undivided

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* After the publication of that report replies were received from the Governments of Argentina, Cameroon, Greece and Iraq.

> possession of all men, as if all possessed a common inheritance.' In consequence, each man could at once take whatever he wished for 'his own needs', and could consume whatever was capable of being consumed. The enjoyment of this universal right then served the purpose of private ownership; for whatever each had thus taken for his own needs another could not take from him except by an unjust act." 1/

11. However, it was noted that property in the form of land possession and ownership of a small business was neither ordained by God nor required by natural law, but followed from economic activity and economic relations regulated by law.

12. Hugo Grotius described that as follows:

> "At the same time we learn how things became subject to private ownership. This happened not by a mere act of will, for one could not know what things another wished to have, in order to abstain from them - and besides several might desire the same thing - but rather by a kind of agreement, either expressed, as by a division, or implied, as by occupation. In fact, as soon as community ownership was abandoned, and as yet no division had been made, it is to be supposed that all agreed, that whatever each one had taken possession of should be his property. 'It has been granted', says Cicero, 'that each may prefer to acquire for himself, rather than for another, whatever contributes to the advantage of life; and in this there is no conflict with nature'. To this should be added the sentence of Quintilian: 'If this is settled, that whatever has come into a man's possession is the property of the possessor, certainly what is rightfully possessed is not taken away without injustice." 2/

13. Property was considered by some writers of that time not only as things or goods, but first of all as a means of economic independence and then as a necessary condition for political representation and participation in government. Its relationship to human rights was also noted.

14. The concept of property has developed in accordance with the various models of social organization. It was recognized as a legal institution in the most ancient social systems.

C. Towards the elaboration of a legal concept of property

15. The notion of property has never been expounded more emphatically than by John Locke who stated as follows:

> "God the Lord and Father of all, has given no one of his Children such a Property; in his peculiar Portion of the things of this World, but that he has given his needy Brother a Right to the Surplusage of His Goods; so that it cannot justly be denyd him, when his pressing Wants call for it. And therefore no Man could ever have a just Power over the Life of another, by Right of Property in Land or Possessions". 3/

16. Thus the principle was proclaimed that the right to own property was a fundamental human right. It was also regarded as a basic purpose of all Governments. James Madison, a leading drafter of the United States Constitution stated that "the protection of different and unequal faculties of acquiring property" was "the first object of government". 4/

17. Another well-known drafter, Governor Morris, stated during the Constitutional Convention:

> "Life and liberty [are] generally said to be of more value, than property. An accurate view of the matter would nevertheless prove that property [is] the main object of Society." These were not isolated statements or idiosyncratic views: The protection of private property was a nearly unanimous intention among the founding generation. 5/

18. The leaders of the American revolution were inclined to follow those ideas; but after much reflection they finally settled for life, liberty and the pursuit of happiness to be incorporated in the Constitution. But the United States Constitution provided for the protection of private property. It contains provisions relating to explicit restrictions against the taking of property without due process and just compensation, against impairment of the obligation of contracts, against bills of attainder and against debased currency, all backed up by the institution of judicial review. Still more important, as was pointed out, is the structure of government, which was designed to promote economic stability and to insulate property rights from popular upheavals. 6/

19. The English Enlightenment and the French siècle des lumières were certainly the cradles of all these ideas which, undoubtedly further enriched by Dutch and German thinking, were declared as absolute truth in the Déclaration des droits de l'homme et du citoyen of 1789.

20. The representatives of the peoples of France, formed into National Assembly, recognized and declared that there were natural, inherent, inalienable, imprescriptible and sacred human rights, considered that ignorance, neglect or contempt of these rights were the sole causes of public misfortunes and corruptions of government and that respect for them was the end of all social institutions. These rights of man and citizen stated, in particular, that liberty, property, security and resistance to oppression are fundamental rights (art. 3) and that no one ought to be deprived of the right to property, being inviolable and sacred, except in cases of evident public necessity, legally ascertained, and on conditions of previous just indemnity (art. 17).

21. The Declaration was in full accordance with the most progressive thinking of the time and represented its best ideas which were accepted by others and, in the form of pertinent rights, they were incorporated into the constitutions and legislature of many countries.

22. However, there was opposition to those ideas as a whole and different views were expressed on that right in particular. As the early French socialist Proudhon said, "property is theft". But even he did not condemn all that the term included. While denying the concept of property, he asserted the right to its possession.

23. In the Marxist view, the property owner was a capitalist and an exploiter of the proletariat, living by owning the means of production. Consequently, according to the Marxist theory, all productive property must be vested only in the State, to use and dispose of in the collective interest, and if a capitalist's property is taken from him it should not be subject to any compensation.

24. Those ideas were also incorporated into constitutions and other legislation of socialist countries and involved gross violations of human rights. For example, enforced collectivization in the late 1920s and early 1930s in the Union of Soviet Socialist Republics led to the unprecedented deprivation of millions of peasants of their land, their deportation and, as a result, the widespread famine of the early 1930s, followed by years of general malaise.

25. However, many fundamental changes have taken place in the eastern part of Europe since late 1989. A "private market economy" was proclaimed as one of the basic goals of those changes as the economic counterpart of democracy in the political arena. Such an order for the economy entails not only decentralization in the sphere of economic decision-making, but also the full recognition, in law and in fact, of private property rights.

26. As a general concept, property was defined:

> "as an exclusive right to control an economic good; it is the name for a concept that refers to the rights and obligations, privileges and restrictions that govern the relations of men with respect to things of value. People everywhere and at all times desire the possession of things that are necessary for survival or valuable by cultural definition and that, as the result of the demand placed upon them, become scarce. Customs as well as legislation enforced by organized society control the competition for, and guarantee the enjoyment of, these desired things. What is guaranteed to be one's own is, in a broad sense, property." 7/

D. Background: Measures taken by United Nations bodies

27. The Universal Declaration of Human Rights consists of a preamble and 30 articles setting forth the basic human rights and fundamental freedoms to which all men and women everywhere in the world are entitled, without discrimination. The articles dealt with civil and political rights (arts. 3-21) as well as economic, social and cultural rights (arts. 22-27). Among the civil and political rights recognized in the Declaration is the right to own property (art. 17).

28. The complexity of the issues underlying the right to property was evidenced during the drafting of this article. The first session of the Commission on Human Rights produced a draft reading: Everyone has the right to own personal property. No one shall be deprived of his property except for public welfare and with just compensation (E/CN.4/21). At the Commission's second session a working group proposed to add "in conformity with the laws of the State in which such property is located", after "everyone has the right to

own property" (E/CN.4/57). This text was subsequently included in the draft International Declaration on Human Rights, submitted by the Commission to the Economic and Social Council in 1947 (E/600).

29. With respect to the elaboration of this article, it was pointed out 8/ that in the first draft the right to property was dealt with in article 14 in these terms:

> Article 14. 1. Everyone has the right to own property in conformity with the laws of the State in which such property is located.
>
> 2. No one shall be arbitrarily deprived of his property.

30. The text contained three central ideas:

(a) That the ownership of private property was considered fundamental to human life;

(b) That the scope of the right to property should be governed by the lex loci; and

(c) That the right to property should be given adequate legal protection against arbitrary deprivation.

31. It was further stated that this first draft did not make it clear whether each man was entitled to a certain minimum of property; nor did it state whether ownership should be individual or whether it could be collective. Furthermore, while arbitrary deprivation of his property was prohibited, in so far as the scope of this right was concerned, man, the subject of it, was totally dependent on the legal provisions of the place where the property was situated. At its meeting at Lake Success (24 May-18 June 1948), the Commission revised the text of this article 14, which became article 15 of the draft. In the new version, article 15 read thus:

> Article 15. 1. Everyone has the right to own property alone as well as in association with others.
>
> 2. No one shall be arbitrary deprived of his property.

32. Some further proposals and amendments did not survive subsequent debates in the Commission, the Economic and Social Council and the Third Committee of the General Assembly 9/ and the final text was retained as referred to above.

33. The Universal Declaration was adopted by a resolution of the General Assembly whereas the International Covenants were signed and ratified by States. The former was conceived as "a common standard of achievement" and is deemed to enunciate only moral rules with no binding effect but the latter reflects "a meeting of minds of the contracting parties on the specific duties and obligations they intend to assume, and their agreement that the undertakings must be effectively performed".

34. In the course of the consideration by the Commission on Human Rights of the draft covenants on human rights, the question of including an article on the right to own property in the draft covenants was the subject of considerable discussion, particularly at the seventh, eighth and tenth sessions of the Commission. The travaux préparatoires of an article on the right to own property for eventual insertion into the Covenants on Human Rights reflected the diversity of opinions and the difficulties of drafting a text that could find common acceptance. While no one questioned the right of the individual to own property, there were considerable differences of opinion with regard to the concept of property, its role and functions, and the restrictions to which the right to own property should be subjected.

35. No agreement was reached on a text or on whether the right should be included in the International Covenant on Civil and Political Rights or in the International Covenant on Economic, Social and Cultural Rights or in both. 10/ An attempt was made to come to an agreement through the appointment of a sub-committee of the Commission on Human Rights; however, the text proposed by the sub-committee was rejected and the Commission, at its tenth session, decided to adjourn indefinitely consideration of the question of the inclusion of an article on the right to property in the draft covenant on economic, social and cultural rights.

36. Formulation of the right presented many difficulties in the Human Rights Commission. 11/ Three shades of opinion were discernible. One view was that the right should be drafted in broad and general terms since, having regard to different social and political systems prevailing in the world, any attempt to put it in elaborate or precise terms might accentuate differences of views. Thus, as already noted, a text based on article 17 of the Universal Declaration of Human Rights itself was proposed to be included in the covenants. The second view favoured a draft in precise legal terms spelling out the limitations or qualifications subject to which the right to property would find a place in the covenants. A third view would have the Commission include a text based on article 23 of the Inter-American Declaration of the Rights and Duties of Man adopted at Bogota in 1948 stipulating that "every person has a right to own such private property, as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home". This school of thought would concede to the individual a minimum amount of property without attempting to specify limits within which the right was to enjoy international protection.

37. The representatives generally recognized that the right to own property was subject to some degree of control by the State, but certain safeguards against abuse would be desirable. In this connection, suggestions were made so that an individual could not be deprived of his property "arbitrarily", "without due process of law", "unlawfully" or "without compensation". Opinions differed as to whether the article should make express provision for compensation in the event of expropriation and, if so, what expression should be used to describe the amount of compensation payable.

38. During the consideration of the draft covenants by the General Assembly, suggestions for the inclusion of an article on the right to property in one or the other of the two covenants were made, but none was taken to a vote. Consequently, the covenants, as adopted on 16 December 1966, do not contain a provision concerning this right.

39. Aspects of the right to property have repeatedly been considered and dealt with by the General Assembly and the Economic and Social Council in connection with the problem of land reform. To the extent that it deals with nationalization, expropriation and requisitioning, General Assembly resolution 1803 (XVII) of 14 December 1962 on permanent sovereignty over natural resources deals with aspects of the right to own property in the context of the right of peoples and nations to permanent sovereignty over their natural wealth and resources.

40. The General Assembly and the Commission on Human Rights have adopted a number of resolutions in which important issues were brought forward for consideration by the Secretary-General in drafting his report. Both the Assembly and the Commission have recognized that there exist in Member States many forms of legal property ownership, including private, communal, social and state forms, each of which should contribute to ensuring the effective development and utilization of human resources through the establishment of sound bases for political, economic and social justice. They have also recognized that the right to property may play an influential role in fostering widespread enjoyment of other human rights and contribute to securing the goals of economic and social development. The substances of those resolutions is considered in more detail below.

I. THE PLACE OF THE RIGHT TO OWN PROPERTY IN THE HIERARCHY OF ALL HUMAN RIGHTS, SPECIFIC FEATURES OF THAT RIGHT AND ITS RELATIONSHIP TO OTHER HUMAN RIGHTS

A. Legal aspects - international dimension of the right to own property

1. United Nations instruments relating to the right to own property

41. Within the United Nations system the right to property is recognized in several instruments already adopted and is also mentioned in some draft instruments which are being prepared, such as the draft declaration on the rights of indigenous populations.

Universal Declaration of Human Rights

42. The first mention of this right is in article 17 of the Universal Declaration of Human Rights, which reads:

> "1. Everyone has the right to own property alone as well as in association with others.
>
> 2. No one shall be arbitrarily deprived of his property."

43. In addition to article 17 of the Declaration, the right to own property has found its way into some other global instruments. Therefore, it can be asserted that the Declaration has played a significant role in the development of the processes of international legal rules as a whole and this right, in particular.

Convention relating to the Status of Refugees of 1951

44. Article 13 of the Convention relating to the Status of Refugees of 1951 provides that refugees shall receive treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property. As regards industrial property of refugees, article 14 of the Convention provides that "In respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic and scientific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country".

Conventions relating to the Status of Stateless Persons of 1954

45. The Convention relating to the Status of Stateless Persons, adopted in 1954, provides in its article 13 that a stateless person shall be accorded treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards

the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.

International Convention on the Elimination of All Forms of Racial Discrimination of 1965

46. Under article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (resolution 2106 A (XX), annex), States parties undertake to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law, notably in the enjoyment of a number of rights, including "the right to own property alone as well as in association with others" and "the right to inherit".

Convention on the Elimination of All Forms of Discrimination against Women of 1979

47. The Convention of the Elimination of All Forms of Discrimination against Women in its articles 15 and 16, provides, *inter alia*, the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

Declaration on the Rights of Disabled Persons of 1975

48. The Declaration on the Rights of Disabled Persons of 1975 in its paragraph 11 provides that "Disabled persons shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their persons and property".

Declaration on Social Progress and Development of 1969

49. The Declaration on Social Progress and Development of 1969 deals with the role of property in development. Article 6 of that Declaration reads, in part:

> "Social progress and development require the participation of all members of society in productive and socially useful labour and the establishment, in conformity with human rights and fundamental freedoms and with the principles of justice and the social function of property, of forms of ownership of land and of the means of production which preclude any kind of exploitation of man, ensure equal rights to property for all and create conditions leading to genuine equality among people".

50. To the extent that it deals with nationalization, expropriation and requisitioning, General Assembly resolution 1803 (XVII) of 14 December 1962 entitled "Permanent sovereignty over national resources" also deals with aspects of the right to own property against the background of the right of peoples and nations to permanent sovereignty over their natural wealth and resources. Further, various aspects of the right to property have repeatedly been considered and dealt with by the General Assembly and the Economic and Social Council in connection with the problems of land reform.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990

51. Article 15 of the Convention (resolution 45/158, annex) provides that "No migrant worker or member of his or her family shall be arbitrarily deprived of property, whether owned individually or in association with others. Where, under the legislation in force in the State of employment, the assets of a migrant worker or a member of his or her family are expropriated in whole or in part, the person concerned shall have the right to fair and adequate compensation".

2. Standards established by the International Labour Organisation (ILO)

52. Among the variety of standards established by ILO, attention might be drawn to Convention No. 95 and Recommendation No. 85 on the Protection of Wages, 1949, which lay down standards concerning an essential aspect of the right of workers to own property, in this case remuneration for work done or service rendered; the protection includes the right to be paid their wages in legal tender and directly, freedom to dispose of their wages and protection against deductions, attachment or assignment, and in case of bankruptcy or judicial liquidation of an undertaking. Convention No. 117 on Social Policy (Basic Aims and Standards), 1962 which, inter alia, provides for the control, by enforcement of adequate laws or regulations, of the ownership and use of land and resources to ensure that they are used, with regard to customary rights, in the best interests of the inhabitants of the country. Home ownership by workers and access to land by tenants and share-croppers are envisaged respectively by the Workers' Housing Recommendation, 1961 (No. 115), and the Tenants and Share-croppers Recommendation, 1968 (No. 132). The right of ownership, collective or individual, over the lands occupied by the populations concerned, and the question of underground wealth, are dealt with in part II of ILO Convention No. 107 and Recommendation No. 104 on Indigenous and Tribal Populations, 1957, and in Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, 1989.

3. Industrial property conventions

53. A number of treaties provide substantive protection to property rights as a result of intellectual activity, including: the 1983 Paris Convention for the Protection of Industrial Property which has been revised many times and whose objectives are the protection of patents, utility models, industrial designs, trademarks, service marks, collective marks, trade names, indications of source and appellations of origin, and the repression of unfair competition; the 1891 Madrid Arrangement Concerning the International Registration of Marks which provides for the international registration of trademarks and service marks; the 1986 Bern Convention for the Protection of Literary and Artistic Works which provides certain minimum standards of protection to the author, i.e. the exclusive right to translate, make reproductions, to broadcast, to perform in public dramatic and musical works, to make motion pictures, adaptations and arrangements of the work; the 1952 Convention on the International Right of Correction (revised in 1971) which contains substantive rights similar to those provided by the Bern Convention, but according to its provisions the minimum term of protection to be given by

contracting States is the author's life plus 25 years; the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations protects the three categories of subjects mentioned in its title against unauthorized acts such as broadcasting and reproduction to the public without the consent of the performer, producer or broadcaster, as the case may be; the 1971 Geneva Convention for the Protection of Producers of Phonograms against unauthorized Duplication of their Phonograms which obliges contracting States to protect nationals or other contracting States against the unauthorized reproduction of phonograms and the importation of such reproductions for distribution to the public; and the 1974 Brussels Convention Relating to the Distribution of Programme-carrying Signals Transmitted by Satellite obliges contracting States to take "adequate measures" to prevent unauthorized distribution from or on its territory of any programme-carrying signals transmitted by satellite.

4. Declaration of Principles adopted by the World Conference on Agrarian Reform and Rural Development (WCARRD)

54. FAO, which has a clear mandate in the areas of agrarian reform and rural development, has adopted principles and programmes of action which should form the basis of a coordinated United Nations approach towards agrarian reform and rural development. Essentially, these have their origins in the World Conference on Agrarian Reform and Rural Development (WCARRD), held at FAO headquarters in July 1979.

55. WCARRD adopted a Declaration of Principles, which recognized that "past development efforts have largely failed to reach and adequately to benefit the rural areas". A new approach was then outlined in the WCARRD Programme of Action, intended to guide nations in their agrarian reform and rural development efforts. Among the areas identified by WCARRD for action at the national level were: wider access for the rural poor to land and other resources; wider access to agricultural inputs, markets and services; participation in the institutions and systems governing their lives. Among other things, WCARRD called for limits to the size of private landholdings, precedence in the distribution of assets for tenants, smallholders and landless agricultural labourers, and support for cooperative institutions.

5. Regional instruments

African Charter on Human and Peoples' Rights

56. The African Charter on Human and Peoples' Rights, adopted by the eighteenth Assembly of Heads of State and Government of the Organization of African Unity, held at Nairobi in June 1981, provides in article 13, paragraph 3: "Every individual shall have the right of access to public property and services in strict equality of all persons before the law". Further, article 14 of the Charter states that "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws".

American Declaration of the Rights and Duties of Man

57. The American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States in 1948, contains a number of provisions relating to economic and social rights, including that of property. Article XXIII of the Declaration states that "every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home".

American Convention on Human Rights

58. Article 21 of the American Convention on Human Rights, signed at the Inter-American Specialized Conference on Human Rights in 1969, reads as follows:

> "1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment in the interest of society.
>
> 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
>
> 3. Usuary and any other form of exploitation of man by man shall be prohibited by law."

European Convention for the Protection of Human Rights and Fundamental Freedoms

59. The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 provides in article 14 that the enjoyment of the rights and freedoms set forth therein shall be secured without discrimination on any grounds, including non-discrimination in respect to property. Article 1 of Protocol No. 1 (of 20 March 1950) provides that every "natural or legal person is entitled to the peaceful enjoyment of his possessions" and that no one "shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law". Under the second paragraph of that article, the "preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties". A number of property rights cases have been decided by the European human rights institutions.

B. Specific features of the right to own property

60. The right to own property is regarded as the individual and collective one given the fact that article 17 of the Universal Declaration of Human Rights provides for the right to own property alone as well as in association with others. This provision may also predetermine the full recognition of all types of property, including private property.

61. This statement may be confirmed, at least at the regional level, by the Document of the Bonn Conference on Economic Cooperation in Europe adopted in 1990. In this document the participating States recognized the relationship between political pluralism and market economies, and declared their commitment to the principle concerning full recognition and protection of all types of property, including private property, and the right of citizens to own and use them, as well as intellectual property rights. 12/

62. The notion of property lies at the very foundation of any relationship between man and nature and of whatever use man makes of the goods provided to him by nature.

63. The importance of the concept of property goes far beyond the legal sphere, as it constitutes the basic factor in the prevailing economic system within a specific society and the most fundamental variable of its social order. Its links with the political programme accepted within that society are therefore manifest. Furthermore, its philosophical and ethical implications are obvious.

64. The basic laws and other legislation of many States recognized the right to own property as both a legal institution and a basic right. According to the information available, property rights are fundamental to the legal systems of Algeria, Argentina, Cameroon, Canada, China, Colombia, Costa Rica, Cuba, Egypt, Germany, Greece, Haiti, Iraq, Italy, Kenya, Luxembourg, Mexico, Morocco, Namibia, Nepal, Pakistan, Panama, Portugal, Qatar, Saudi Arabia, Senegal, South Africa, Sudan, Sweden, Syrian Arab Republic, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Venezuela and Yugoslavia.

65. In the view of the United States, the right to own and enjoy property is an essential and integral part of the protection of human rights and fundamental freedoms which is afforded by the Constitution and laws of the United States. The United States Constitution secures the individual's fundamental freedom from arbitrary search and seizure.

66. As was stated, the social market economy in Germany permitted all forms of acquisition of property. It only imposed constraints on the acquisition and ownership of property where the public wealth would otherwise be impaired. The acquisition and ownership of property are protected as basic rights.

67. The Government of Turkey pointed out that the legal framework for the exercise of this right was defined in book IV of the Turkish Civil Code, entitled "Rights In Rem", which governed the exercise of the right to own property individually or in association with others.

68. Under the Italian Civil Code, "property owners have the right to enjoy and dispose of property, fully and exclusively, within the limits of and in compliance with the obligations laid down by law".

69. The provision that appears at the beginning of part I, title II ("Property") must be in conformity with article 42 of the Constitution, which determines the social function of property and provides for access to property

by everyone, thereby setting the effective limit to the right to enjoy and own property as well as being in keeping with a specific programme and with specific policy directives for the legislature.

70. The Chinese Constitution stipulates that the State protects citizens' rights to own lawful property. Chinese civil law stipulates not only that individual citizens may own property, but also that they can own property in association with others. Chinese citizens may own both movable and immovable property, physical goods and property rights. Whether an individual is Chinese or foreign, whether his property is movable or immovable and consists of necessities or industrial and business assets, Chinese law affords protection. Chinese civil law explicitly states that citizens' lawful property is protected by law, and it prohibits any organization or individual from invading, seizing, damaging or unlawfully sealing, distraining, freezing or expropriating it.

71. According to the Namibian Constitution all "persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees". The State or a competent body or organ authorized by law may expropriate property in the public interest subject to the payment of just compensation.

72. The Racial Discrimination Prohibition Amendment Act of 1991 states that certain acts of a racial discriminatory nature are criminally punishable (e.g. buying or selling of movable or immovable property on racial grounds).

73. The Constitution of Senegal stipulates that the right to own property cannot be affected except when necessary in the public interest, as determined by law, subject to fair compensation paid in advance. Any individual or legal person under private or public law may possess property rights over movable or immovable property.

74. The Government of Morocco stated that the right to property has been recognized for decades as an individual and collective right and this recognition was reflected in its Constitutions of 1962, 1970 and 1972.

75. Yugoslavia stated that the legal system of the State recognized several forms of ownership - State, social, private, collective and mixed - and they enjoy equal legal protection. All these forms, except the social one, ensure their proprietors (physical and legal persons) classical property rights (jus utendi, jus fruendi i jus abutendi). In principle, all assets can be the subject of any form of ownership with certain exceptions such as natural resources which can be State property only. The right of individuals to property is one of the fundamental human rights guaranteed by the provisions of the federal and republican Constitutions.

76. It may be noted that individual and collective ownership of property should not contradict each other as the international law recognized both individual and collective rights. Thus, beneficiaries of this right may be both individuals and groups of persons.

77. This right may be regarded as an inalienable one proceeding from article 30 of the Universal Declaration which states that nothing in the Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth therein.

78. The subject of this right may be possessions of three types: movable, immovable and intellectual property. In particular, those forms of property are recognized in articles 13 and 14 of the Convention relating to the Status of Refugees and in the same articles of the Convention relating to the Status of Stateless Persons.

79. The National Charter of Algeria provides for the rights to property and stipulates "that it extends to everything relating to personal and family use and also the means of production and services ...".

80. Article 14 of the Constitution of the Republic of Cuba states that in Cuba the socialist system of economy applies, based on the entire people's socialist ownership of the means of production and on the abolition of the exploitation of man by man. The procedures and types of socialist State property are then enumerated in article 15 of the Constitution.

81. Article 20, for its part, expresses the State's recognition of the right of small farmers to own their lands and other means and implements of production, according to the stipulations of the law. It also authorizes the establishment of agricultural cooperatives in the cases and forms prescribed by law. Cooperative ownership constitutes a form of collective ownership on the part of the peasants belonging to those cooperatives. Article 22 guarantees the rights to personal ownership of earnings and savings derived from work, of the dwelling to which one has legal title and of the other possessions and objects which serve to satisfy one's material and cultural needs. It likewise guarantees the right of the citizen to ownership of his personal or family working implements and means as long as they are not employed in exploiting the work of others. Likewise, in article 23, the State recognizes the right of political, social and mass organizations to ownership of property intended for the fulfilment of their objectives. Furthermore, article 24 stipulates that the law regulates the right of citizens to inherit legal title to a place of residence and to other personal possessions.

82. The Egyptian legal system recognizes several forms of private property, including an individual's right to own his dwelling and the instruments by which he earns his living. This right is entirely separate from the right of any member of his family, including his spouse, to own private property, as well as from the rights of individuals to own production projects for diverse consumer and investment purposes. While the concept of ownership originally applied only to material items of immovable and movable property, the right of ownership has, since the beginning of this century, been extended to new resources having an economic value. Property rights have come to include the ownership by individuals of the various different forms of literary and artistic rights, as well as the ownership of trade marks, data and patents, of financial and commercial instruments and of business, taken as a group of abstract components.

83. Property within the meaning of article 14 of the Basic Law of Germany embraces all private property rights accruing to an individual. Apart from movable property and real estate, this includes for example, all kinds of rights in rem, membership and partnership rights, pecuniary claims arising from lease, rental or other obligations and intellectual property. Everyone is therefore entitled to acquire and own as his property such items as household effects, clothing, cars, land houses or factories. The Government is not entitled to confiscate them.

84. Article 27 of the Constitution of Mexico establishes a three-sided property regime, comprising private property, public property and social property. Private property is one of the three types of property recognized and regulated by Mexican law. This property regime concerns not only land and water, but also the means of production. In turn, the Civil Code defines private property in terms of its main characteristic: "The owner of property may enjoy and dispose of it within the limits and in the manner laid down by law" (art. 830). Furthermore, in conformity with the provisions of article 747 of the Civil Code, all goods not excluded from trade may be appropriated. Goods excluded from trade are those which may not be appropriated as individual property, either because of their very nature or because the law so stipulates. Once goods have been appropriated by any of the means established for that purpose by law (contract, inheritance, legacy, accession, attachment, occupation, award, prescription, donation, association, exchange, etc.), the owner may use and dispose of the goods subject to no limitations other than those laid down by law.

85. The preamble of the Constitution of Cameroon provides that ownership is the right, guaranteed by law to everyone, to use, enjoy and dispose of property.

86. In the preamble to the Constitution of Venezuela, one fundamental aim is to achieve equitable participation in the enjoyment of wealth, thus also implying an aspiration to equitable participation in property. Article 99 of the Constitution guarantees the right to own property for all the inhabitants of the Republic and determines that, in view of its social function, property shall be subject to such levies, restrictions and obligations as are determined by law for the purposes of public utility or general interest.

87. In the view of FAO, the word property as used in Commission resolution 1992/21 has a very broad connotation including, for instance, intellectual property. It is therefore difficult to use comprehensive terminology. When referring to property as economic means of production, however, FAO feels that rights of access possibly exceed the importance of a narrowly defined concept of property.

88. In the view of the Four Directions Council, the word "ownership" requires clarification. There is no such thing as absolute private ownership of productive property in any economic system it knows. In those national systems in which productive property is not State-managed or controlled, the private use of productive property is none the less regulated to a greater or lesser degree by the State. Regulation affects not only the range of permissible uses of the property, but also requires the sharing of its value or product, through taxation. The real difference between State and private

systems of property ownership is therefore a matter of the degree of centralization of management, and the proportion of the product which is redistributed.

89. International instruments in the field of human rights do not contain provisions concerning the definitions of different forms of "possessions". Those definitions may be found in the jurisprudence of regional and national courts. For instance, according to decisions of courts, the duty to contribute to a State's social security scheme may give rise to a property right over certain assets: that may depend on how the assets are used for the payment of a pension. 13/ "Possessions" does not include a child's right to acquire its parent's property on intestacy or by gifts or bequests, 14/ nor the income from the letting of property, 15/ but it may include so-called "perpetual" burial rights. 16/ A notary's claim for fees only becomes a "possession" when he has rendered services for which he is entitled to charge under the existing regulations: the mere expectation that these will not be changed in the future is not a property right. 17/ The Privy Council has held 18/ that the right of a public officer not to be transferred against his will is not a right of property; the High Court of Uganda has held 19/ that the word "property" in that State's Constitution includes a contract.* It may be noted that within the meaning of the Protocol to the European Convention on Human Rights income is not considered as a property right.

90. The contents of the right to own property may be regarded as a number of exclusive powers of ownership, including "acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration". 20/ It is confirmed by the Document of the Bonn Conference mentioned above in which the participating States expressed their belief that "economic freedom for the individual includes the right freely to own, buy, sell and otherwise utilize property". 21/

91. From the point of view of Marxist theory, it was necessary to recognize that ownership derived from labour and that this was at the centre of the structure of property. This led to the declaration that man was the main productive force of society, where individual interests prevailed over State interests. In reality it was quite the opposite.

92. In the eastern part of Europe property rights reform and privatization are two core components of transformation policies. Establishment of clear property rights and the environment conducive to enforcing them are regarded as essential ingredients of new policy in the east. It should be noted that unambiguously demarcated property rights are being vested as much as possible, depending on the State, in the hands of individuals and collectives. However, property rights reform in the east cannot be confined to full divestment of state and related government assets to other entities that can take possession of property.

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* The decisions referred to were reproduced from Sieghart Paul, The International Law of Human Rights. Clarendon Press, Oxford, 1983, p. 254.

93. In addition, modern trends, especially in the course of reforming property in the Eastern European States, raise the question of the role of every form of property: private, communal and State, which in turn exist in many varieties. Given the enormous variety of forms available and their social importance, one needs to be highly sceptical of simplistic theories. If, on the one hand, property appears in some form to be essential for any society, on the other, "private ownership of things other than the products of purely personal labour seems always to be either less than full or less than exclusive". 22/

94. Article 1 of the First Protocol to the European Convention on Human Rights specifies that "Every natural or legal person is entitled to the peaceful enjoyment of his possessions", but asserts "the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest". Thus this right is part and parcel of the very form of government. It allows for the acquisition and ownership of private property and it protects individuals and groups of persons exercising this right by imposing restrictions on the State with respect to any encroachments. As Franklin D. Roosevelt stated in his speech in Portland, Oregan, on 21 September 1932, it was the purpose of the Government to see that not only the legitimate interests of the few were protected but that the welfare and rights of the many were conserved.

C. Relationship of the right to own property to other human rights

95. No attempts by scholars have been found to link the right to own property with a hierarchy of norms. It may be because a hierarchy presumes the existence of several levels of rules standing one above the other. International treaties and norms incorporated therein stand on an equal footing, except for the emerging rules of jus cogens and Article 103 of the Charter of the United Nations which provides that in the event of a conflict between the obligations of Member States under the Charter and their obligation under any other international agreement, their obligation under the Charter shall prevail.

96. In the absence of effective institutional procedures for making a determination of the greater or lesser importance of some rights and given the elusiveness of international consensus, the characterization of some rights as more important or fundamental results largely from subjective perceptions.

97. With respect to the right to own property, it may be considered from the point of view of the character of instruments: legally binding and declarations. It may be also noted that this right was incorporated in universal instruments and in regional treaties. The degree of ratification and accession to universal conventions containing this right does not allow us to state that we deal with a universally recognized right. However, the level of its recognition is steadily increasing, approaching universality.

98. The Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the regional instruments attribute this right to civil and political rights. However, the Commission on Human Rights has considered it under the question of the

realization in all countries of economic, social and cultural rights. And it was the General Assembly which, in its resolution 45/98 of 14 December 1991, requested the Commission to consider this question under this item.

99. The Expert is of the view that the principle of the unity and indivisibility of human rights declared and reiterated in a number of United Nations instruments and resolutions helps to understand the place of this right among and link with other human rights.

100. Concerning this interrelationship, the Government of Cuba stated as follows:

> "We are convinced that at the present time it is impossible to address the question of the observance of the right to own property without examining its relationship with certain fundamental and inalienable human rights, such as the right of peoples to self-determination, their right to permanent sovereignty over their natural wealth and resources and the right to development, as well as the closely linked need to establish a new international economic order and to solve the problems of the heavy external debt burden on the impoverished economies of the developing countries.
>
> Moreover, it is impossible to set the right to own property against the fundamental and basic right of everyone to life, work, housing, to an education and medical care and the necessary social services and to participate in economic management, including the management of the economy of one's country. If the right to own property is proclaimed in isolation, without eliminating poverty, unemployment, racial and social discrimination as well as all forms of inequality, that right will remain a mere pipe-dream for huge sectors of the population and for entire countries."

101. Canada pointed out that property rights were fundamental to the Canadian legal system, subject only to limitations in the public interest. In this context, property rights, together with the other rights set out in the Universal Declaration of Human Rights and the two International Covenants, are recognized in Canada as contributing to the dignity and the worth of the human person and the principles of freedom and justice affirmed by the International Bill of Rights.

102. In the view of the United States, the national and historical experience of the United States, along with that of many other countries, supports the conclusion that property ownership has been at the core of the development of civil and political rights. Yet, the right to own property either individually or in association with others, and the concomitant right not to be arbitrarily deprived of property, are often overlooked in discussions of basic human rights in most forums. These rights provide a basic mechanism for social organization and for wide participation in society.

103. Luxembourg considers that this right forms part of the body of civil rights accorded to citizens in their private relations with each other by the national law and by international instruments, including those of the

United Nations. All citizens of Luxembourg enjoy civil rights. The same is true of foreigners authorized by the Grand Duke to establish residence in the Grand Duchy of Luxembourg.

104. The State of Qatar believes that human freedom and security cannot be guaranteed without property rights, even if such rights are restricted to the basic elements of personal property. Accordingly, the right to own property falls within the sphere of civil and political rights.

105. FAO pointed out that the right to own property alone as well as in association with others to enhance the exercise of human rights and fundamental freedoms and the respect for the rights of others in meeting the just requirements of the general welfare in a democratic society was recognized by the World Conference on Agrarian Reform and Rural Development.

106. The General Assembly and the Commission on Human Rights have adopted a number of resolutions in which important issues of interrelationship of this right to other human rights were brought forward.

107. In Assembly resolution 42/115 and Commission resolutions 1987/18 and 1988/19, some elements were brought forward relating to the links between the right to own property and the right to self-determination, the right to sovereignty over all natural wealth and resources and the right to the establishment of a new international economic order. Referring to article 6 of the Declaration on Social Progress and Development, the Assembly and the Commission reaffirmed that social progress and development required the establishment, in conformity with human rights and fundamental freedoms and with the principles of justice and the social function of property, of forms of ownership of land and of the means of production which preclude any kind of human exploitation, ensure equal rights to property for all and create conditions leading to genuine equality among people.

108. In those resolutions the Assembly and the Commission also emphasized the role of the public sector in promoting the economic development of developing countries, expressed their conviction that social justice was a prerequisite for lasting peace and that man could achieve complete fulfilment of his aspirations only within a just social order, and called upon States to ensure that their national legislation with regard to all forms of property precluded any impairment of the enjoyment of human rights and fundamental freedoms, without prejudice to the right freely to choose and develop the political, social, economic and cultural systems. Finally, those resolutions referred specifically to transnational corporations and urged them to ensure that their activities did not adversely affect the process of implementing human rights in developing countries.

109. As was pointed out earlier, it was hard to envisage a democracy without ensuring the right to own property. On the other hand, effective materialization of this right can strengthen democracy and social stability; for instance, by promoting broad-based shareholding in society, privatization may lead to the constitution of a strong bulwark against social disorder. Democratic institutions and decision-making should also help maintain social stability as people living in a democracy feel they have a voice in the way in which their society is being run.

110. There has been a tendency to move towards a broader and more comprehensive concept of the right to life which characterizes the right to life not only as the legal foundation for all other rights, but also as an integral part of all the rights that are essential to guarantee the access of every human being to all the goods, including his or her legal possessions, required for the development of his/her material, moral and spiritual existence. On the other hand, deprivation of those legal possessions, especially in armed conflicts, endanger the right to life.

111. While all human rights are clearly indivisible and interdependent, the right to housing is a right most closely related to the right to own property. Since the right to adequate housing may be an integral and important part of the right to own property, its absence must be regarded as a deprivation of other fundamental human rights such as the right to liberty and security of person.

112. As the consideration of the right to adequate housing is the subject of the study carried out by Mr. Rajindar Sachar, Expert of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, there is no need to analyse it in detail in the present report. However, it seems appropriate to make reference to the following statement by Mr. Sacher which is fully shared by the independent Expert:

> "Housing must be seen not simply as the provision of houses, but primarily as an instrument for the promotion of justice, equality and peace ...
>
> The right to a secure place to live is a fundamental one. The sense of security, dignity and community gained from being able to retain a home is an essential prerequisite for the pursuit and exercise of a variety of other human rights, including the right to choose one place of residence, the right to vote, the right to popular participation, the right to health, the right to a safe environment and other rights comprising a dignified life." 23/

113. The cumulative evidence contained in the reports on slavery prepared by Special Rapporteurs of the Sub-Commission and submitted by the Working Group on Contemporary Forms of Slavery contained evidence that, although chattel slavery in the former traditional sense no longer existed, some of its forms persist in the sense of having rights of ownership or contractual rights to the labour of others, where contracts were not freely entered into or were conditions of labour approximated to those characteristic of serfdom or chattel slavery. Among those forms of slavery the Working Group devoted attention to the sale of children, the exploitation of child labour and debt bondage as well as the exploitation of the prostitution of others and the sale of human organs for transplantation, which violated the right to health.

114. The right to development and intellectual property represents a balancing of the private right of the creator or inventor to protection of his intellectual property against the right of the community to enjoy the benefits of the sum of human art and knowledge. Domestic laws and international treaties on intellectual property, for the most part, protect the creator's

private right. In recent years, however, certain countries, mainly the developing countries, have been seeking to derogate from this right in the name of their right to economic development.

115. Various replies referred to the relationship between the right of everyone to own property and other political, economic and social rights. Mention is made in this context of the right of freedom of association, freedom from discrimination, freedom of labour, the right to equivalent pay for work or service rendered, and other rights. It is stressed that the holding of property should not increase social discrimination or injustice, prevent or impede social integration or full participation in the economic or social policy-making processes, increase unemployment or neglect social responsibility. In this regard, attention was drawn to discriminatory factors which may act to restrict the social integration and advancement of women, the poor, the aged or the young in many parts of the world.

116. During the consideration of the 1992 report at the forty-ninth session of the Commission on Human Rights, it was pointed out that the right to own property was not an isolated right but a right which was instrumental in enhancing both personal dignity and fostering socio-economic well-being. It was also stated that international human rights instruments recognized this interrelationship by according property an important role in meeting the need for a decent standard of living, in maintaining the dignity of the individual and in enhancing his security. In addition, the relationship of the right to own property to other human rights, in particular to such civil and political rights as freedom of expression, assembly and the rights of persons belonging to minorities, was emphasized.

117. The indivisibility of human rights and the interdependence of civil and political rights and economic, social and cultural rights are part of modern civilization. An individual's freedom is violated not only when he is physically or morally attacked, but also when he is deprived of the means to live with dignity and is denied the material circumstances that are indispensable for a full existence.

118. As was stated, there was a desire of property in the sanest and best men, which Nature seems to have implanted as conservative of her works, and which was necessary to encourage and keep alive the arts. 24/

II. THE SIGNIFICANCE OF THE RIGHT TO OWN PROPERTY IN CONTRIBUTION TO SECURING PEACE AND GOALS OF ECONOMIC AND SOCIAL DEVELOPMENT AND ITS RELATIONSHIP TO ENSURING THE FULL AND FREE PARTICIPATION OF INDIVIDUALS IN THE ECONOMIC AND SOCIAL SYSTEMS OF THE STATE

A. The significance of the right to own property in contribution to securing peace and goals of economic and social development enshrined in the Charter of the United Nations

119. In General Assembly resolution 41/132 and Commission on Human Rights resolution 1991/19, the conviction was expressed that the right of everyone to own property alone as well as in association with others was of particular significance in fostering widespread enjoyment of other basic human rights and contributed to securing the goals of economic and social development enshrined in the Charter of the United Nations.

120. There is a complex interrelationship between the promotion and protection of the right to own property and the achievement of the goals of economic and social development. The United Nations has repeatedly emphasized that if mankind wishes to restore and develop human rights, to promote social and economic progress, it must secure peace on earth.

121. As long as there is armed conflict and, as a result, gross violations of human rights, there cannot be proper respect for the right to own property. Examples of this assertion are quite evident.

122. Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights on the situation of human rights in the territory of the former Yugoslavia, and some non-governmental organizations have documented cases of looting, burning and pillage by Serbian forces in Bosnia and Herzegovina and Croatia.

123. The Special Rapporteur was able to collect credible testimony concerning the policy of ethnic cleansing and the methods applied to achieve its aim. According to the testimony received, the policy had been openly pursued on the territory of those parts of Bosnia and Herzegovina and Croatia which were controlled by ethnic Serbs.

124. The following examples were brought to the Special Rapporteur:

> "Muslims who wanted to leave the village were allowed to do so only together with their entire family. The transfer of the refugees was organized by the local Red Cross, which cooperated closely with the local Serbian authorities. Before those willing to leave were permitted to do so, they were forced to sign documents stating that they would never come back. No reference was made in those documents to their possessions in the village, their houses in particular. The witness stated that they could either sell them at a ridiculous price or give the keys to the municipality for the duration of their absence which after they had signed the above-mentioned documents, was supposedly for ever ..." 25/

125. The Ministry for Foreign Affairs of the Ukraine, in a letter dated 4 August 1992, informed the Under-Secretary-General for Human Rights that during the period March-May 1992 more than 100 Ukrainians were deported from Vukovar, Mikjushivitsi and Petrivtsi. They were deprived of their property, including their houses, which were given to Serbian refugees from Croatia. In fact, there were no more Ukrainian settlements in Vukovar and Petrovtsi. Ukrainian churches were also expropriated or destroyed. The Ministry stated that such a policy constituted a flagrant violation of human rights.

126. These are only some cases of flagrant violation of the right to own property by Serbs. It was also pointed out, in particular by the Special Rapporteur, that Croatian and Muslim forces had also pillaged and destroyed Serbian property in areas under their control in Bosnia and Herzegovina and Croatia.

127. The scale of violation of the right to own property as well as other human rights in ex-Yugoslavia may be also measured by the numbers of refugees there. According to the United Nations High Commissioner for Refugees, as of 10 July 1992, there were 1,752,500 displaced refugees within ex-Yugoslavia. 26/

128. It may be noted that the effective measures by the United Nations, including the possibility of the prosecution and punishment of the perpetrators of such crimes, may be an important element in the prevention of such crimes and the protection of all human rights, including the right to own property.

129. The Committee on the Exercise of the Inalienable Rights of the Palestinian People has repeatedly expressed its grave concern at the violation by Israel of the human rights of Palestinians in the occupied territory, including violations of their property rights. These have included confiscation of land, restrictions on the use of water resources, demolition of buildings, uprooting of trees and destruction of crops, forced closures of shops, seizures of movable property, and various restrictions on trade and financial exchanges.

130. The report of the European Commission of Human Rights, Cyprus v. Turkey, Application No. 8007/77, adopted by the Committee of Ministers on 2 April 1992, found there to be "proof of taking and occupation of houses and land by ... Turks from the mainland, both military and civilians ... The Commission also found strong indications that Turks from the mainland had settled in the North in houses belonging to Greek Cypriots" (para. 149). The Commission concluded that continuation of this situation was an aggravating factor (para. 134) and that large-scale deprivation of possession of Greek Cypriots was imputable to Turkey (para. 153). Turkey had, according to the European Commission of Human Rights, violated both article 8 of the Convention and article 1 of Protocol No. 1.

131. The principle approach of the United Nations human rights bodies to these issues were set forth in General Assembly resolution 41/132 and Commission resolution 1987/17, which stated that no State, group or person should be

engaged in any activity or perform any act aimed at the destruction, inter alia, of the right to own property. They also urged States to protect the right of everyone not to be arbitrarily deprived of his property.

132. It may be also recalled that the Commission and the Sub-Commission devoted attention to some aspects of the recovery of national assets illegally removed by violators of human rights. For instance, the Commission, in its resolution 1988/20, joined with the Sub-Commission in requesting all States concerned to cooperate in the speedy recovery of the assets belonging to the peoples of the Philippines and Haiti illegally removed by the Marcos and Duvalier families, respectively.

133. Land and the right to own it have always been a source of social tension and even armed conflict. For instance, when rebels in El Salvador first took up arms against the Government in the 1970s, the central issue was the ownership of land. The same issue is now threatening to disrupt the country's progress toward peace. 27/

134. In this connection, it may be recalled that the Commission on Human Rights, in its resolution 1987/18, expressed its conviction that social justice was a prerequisite for lasting peace and that man could achieve complete fulfilment of his aspirations only within a just social order.

135. It may be also recalled that, in accordance with article 28 of the Universal Declaration of Human Rights, everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized.

136. The World is passing through a period of radical changes. The fading of the cold war has transformed the structure of international relations. These developments have involved a redistribution of basic political powers in a number of countries, in line with a better balanced representation of the popular will. In and of itself, this political revolution should in due course lead to the formation of a government on the strength of freely organized, pluralistic elections.

137. But, as developments in ex-Yugoslavia and some parts of the former Soviet Union have proved, there has been no guarantee that this transition would be altogether smooth.

138. However, in States where those processes are relatively normal they involve the creation of the basic elements of market economy and recognition of all forms of property, including private property.

139. In those and many developing countries the task of stabilization and macroadjustment is closely linked to the transformation of the whole social and economic structure, and first of all to changes in property relations. In almost all developing countries there have been tangible changes in the agrarian structure over the past three decades.

140. In many regions, particularly in Asia and Latin America, Governments have adopted land reform legislation and other tenurial reform laws. The general trend, however, has been towards greater rather than less concentration of land ownership, which has led to greater levels of absolute rural landlessness or near landlessness. 28/

141. In Latin America the era of present-day land reforms can be dated back to Mexico (1915-1917) and then to the 1950s (Bolivia and Guatemala), but some kind of land reform programme was adopted almost everywhere on the continent during the 1960s and 1970s. The majority of these programmes, to some extent a response to "pressure from below", were less concerned with the needs of the landless than with the need to modernize the structure of agricultural production, to increase productivity and adapt to technological change. While in some countries limits were imposed on the size of private farms, in other cases landowners were required only to fulfil the "social function of property" by bringing idle land under active cultivation. Thus landowners were given the option of removing tenants from rented land and bringing greater land areas under active cultivation, in order to evade expropriation. 29/

142. The Government of South Africa stated that future legislature may find it necessary to provide for the redistribution of wealth in view of past discrimination. The Abolition of Racially Based Land Measures Act No. 108 of 1991, with effect from 30 June 1991, eradicated the legal framework allowing racial discrimination in this field. In theory, at least, South Africans may now on the whole own land where they please (with the major exception of the so-called independent States). Security of tenure has also increased drastically.

143. The role and interrelationship of the right of everyone to own property for the social and economic development of States raised a variety of political, economic, social and even ideological questions. Almost all Governments responding to the request for information referred to the national dimensions of the right to property in the legal recognition or protection given to property by national law and in some cases to the types of ownership. In addition, certain replies referred to the role which the right to property plays in national development and some touched on the international dimensions of this right.

144. In the view of the United States, much of Government's role in a democratic society arises from the need to regulate competing claims to property among individuals or groups. But in implementing such evenhanded measures and administrative policies, Government should promote the creation of assets and the acquisition of property by individuals over whom it exerts authority. This creation of assets and acquisition of property is an important element of the "pursuit of happiness". When Government becomes an obstacle to that pursuit it becomes destructive of the end for which it was established. Such an outcome will inspire certain individuals, or the people as a whole, to seek to exercise their fundamental right to change their Government.

145. Madagascar stated that the right to own property must be reconciled with the right of peoples to freely determine their political status and freely pursue their economic, social and cultural development, established in article 1 of the International Covenant on Civil and Political Rights, and with the duties of the individual to the community in which alone the free and full development of his personality is possible according to article 29 of the Universal Declaration of Human Rights.

146. Algeria was of the opinion that this right, as defined by law, must be exercised in the interests of society and must contribute to its social and economic development. Its national legislation recognizes the right to individual and collective property and its role in national economic development.

147. This role is affirmed by the National Charter, which regards the exercise of this right as a "contribution on global development and to the consolidation of national independence". In article 16, the Constitution accords an important place to private property as "an integral part of the new social organization" and states that "in economic activity, in particular, it must assist the country's developmental process and be useful for society. It is protected within the framework of law".

148. The policies of the Government of Dominica have always been directed at increasing growth and investment in private ownership, because it believes that the role of the Government is to give direction for growth and to create the right kind of economic environment. The following measures have been taken:

(a) Enactment of legislation on the right to own property;

(b) Enactment of constitutional protection against deprivation of property without compensation;

(c) Provision of facilities for survey and valuation of properties;

(d) Provision of land and property title;

(e) Provision of proper fiscal incentives;

(f) Encouragement to private enterprises in agriculture, industry and tourism;

(g) By following strategic investment in social and economic infrastructure as well as by planning and implementing balanced growth of the sectors and utilization of fiscal policies to support these efforts.

149. The Egyptian Constitution recognizes the importance of the individual private ownership of property and its effective role in fulfilling the objectives of economic and social development, constituting as they do a pivotal element of the purposes and covenants of the United Nations. Article 32 states that "private property shall take the form of non-exploitive capital. The law shall govern the performance of its social function in the service of the national economy within the framework of the development plan ...".

150. The great importance attached to property in Germany was illustrated by the fact that the Government provided tax relief or financial assistance to promote asset formation and savings by the public, especially saving for the purchase of housing and for life assurance. Since the war, the Government has spent billions on promoting asset formation through social and redistribution and has thus assisted great savings.

151. Research made by UNESCO into traditional African forms of land tenure has established that land, sometimes considered to be divine, was a sacred community possession, one that was inalienable and managed by the elders of the tribes. Men, women and children, in accordance with certain rules, enjoyed the usufruct, or access to all the resources of this source of life which lends itself, but does not submit, to mankind. Among the Bamileke, a highly hierarchical society on the high plateaus in western Cameroon, the chief, the notables and the married men managed the plots of land according to the needs of the families, while a single heir was responsible for taking care of the descendants. The particular status of the Mah-foh (queen mother) gave her certain prerogatives, including land-owning rights similar to those of the notables. For the Beti clans, which for a long time were semi-nomadic in the vast forest in the south, the land did not become a valued asset until the colonial era, but was shared only among male heirs.

152. It seems useful in dealing with this issue to consider whatever form of property rights is recognized by the State, and focus attention on the question of the State's power to redistribute these rights, and therefore redistribute relative economic power among different individuals or groups within national society. Some States assert the power to redistribute property for reasons of public policy, some place constitutional limitations on the purposes for which redistribution is permitted, and some condition any redistribution on the payment of compensation to the former owners.

153. The independent Expert shares the view expressed by some Governments that the right to own property alone as well as in association with others, if fully protected, benefits the international community as well. Individuals will choose to trade and invest abroad when they have confidence that the Government of another country will not expropriate their assets without just compensation, will generally permit them to repatriate their earnings, and will respect their ability to make private economic decisions. In relation to civil, political, legal, economic, social and cultural aspects of overall growth and development, the future of the world's former socialist and developing countries depends on full respect for private property rights throughout the world, in every Member State and across all international boundaries.

B. The right to own property and its relationship to ensuring the full and free participation of individuals in the economic and social system of the State

154. As pointed out in the preceding chapter, the Declaration on Social Progress and Development dealt with the role of property in development and the participation of individuals in productive and socially useful labour on the basis of the genuine equality of people.

155. Article XXIII of the American Declaration of the Rights and Duties of Man states that "every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home".

156. The principal focus of General Assembly resolutions 41/132 and 42/115 and Commission resolutions 1987/17 and 1988/18 is on the legal protection of the right to property as a human right and its relationship to the economic and social development of the individual, within his socio-economic system.

157. Some government replies describe the role that the different forms of property play in their countries in promoting the socio-economic development process and in creating conditions in which the individuality of every member of the society can flourish.

158. Today in many States property is considered a key element of the legal order. It is also regarded as vital to society since property and contract form the basis of exchange and trade on which the market economy is built. But even more important is the sense of security and dignity derived from being able to own property.

159. Other communications received from competent bodies of the United Nations system and non-governmental organizations emphasize the need to utilize all human resources for social and economic development and to guarantee equal opportunity for all to participate in these processes. Referring to the various forms of property, it is stated that property rights may be conceived as one of the means of enlarging people's participation in, and the acceleration of, their social and economic development, particularly in developing countries.

160. Thus there is no doubt that through private property man seeks his full development with some degree of freedom and security; thus, this right represents an essential guarantee of human dignity. Through property the individual acquires the economic means by which he is able to develop his personality; it endows him with a sphere of autonomy, i.e. a private living space that is independent from the will of any other person.

161. Nevertheless, one of the most serious clashes is between property viewed as the guarantee of freedom of the individual and safeguard for human dignity, on the one hand, and the concentration of the means of production in the hands of a few along with the unlimited accumulation of wealth by a small number, on the other.

162. As the United States pointed out, democracy itself rests upon the premise of the moral integrity of the individual and the belief that society should be regulated by individual choice decision-making. Respect for this moral principle permits individuals to exercise authority over their economic activities (which most people spend a majority of their time performing), and particularly the practical means and the material output of those activities. Without such authority, individual integrity is greatly impaired by a loss of control over actual work. The individual becomes alienated from society and susceptible to the control of authoritarian and totalitarian forms of Government. Recognition and protection of the fundamental right to own

property gives the individual the means and social standing to exercise personal independence. This was crucial for the development of a democratic form of Government in the United States.

163. The United States is also of the opinion that when a society protects private property rights, individuals have the confidence to use and derive the income that their assets or resources generate, transfer the assets or resources voluntarily to others, and to be assured that contracts of exchange are enforceable. Conversely, the failure to protect these rights makes it difficult for private enterprises and individuals to participate in the economic system. The more precisely these rights are defined, allocated and enforced, the more closely linked will be an individual's decisions and the individual's own welfare. Consequently, when taking decisions affecting such rights, the decision-maker (the business owner or individual) has the greatest incentive to take all benefits and costs into account, since the results will ultimately rebound to the resource owner.

164. In a number of States the right to own property is also regarded as essential to the development of legal, economic, social and cultural institutions in which free and independent persons can participate without discrimination, and in which the protection of other fundamental rights and freedoms is respected.

165. According to the legislation of Germany, the purpose of the guarantee of property is to ensure a measure of freedom enabling the individual to shape his life on his own responsibility. At the same time the individual is guaranteed the right to participate, on his own responsibility and on the basis of private use, in shaping the country's legal and social order. According to decisions by the Federal Constitutional Court, the protection afforded by the guarantee of property also covers entitlements under public law in certain circumstances.

166. In the opinion of the Government of Germany, a social market economy is better suited than any other system to achieve simultaneously equal opportunities, property formation, prosperity and social progress. A social market economy is not only the most effective economic order, but also corresponds to human needs: it places demands on the individual, but does not control him; instead it grants him greater personal freedom.

167. The Government of Cuba stated that the right of States and peoples freely to choose and to develop, without outside interference, their political, social, economic and cultural systems, as well as to determine their domestic legal system, would include the right to determine, in each of them, the various forms of property ownership and the way in which that right would be exercised for persons under the State's jurisdiction.

168. Article 106 of the Greek Constitutions states that:

> "1. In order to consolidate social peace and protect the general interest, the State shall plan and coordinate economic activity in the country aiming at safeguarding economic development of all sectors of the national economy. The State shall take all measures necessary to develop

> sources of national wealth in the atmosphere, in underground and underwater deposits, and to promote regional development and to further especially the economy of mountainous, insular and border areas.
>
> "2. Private economic initiative shall not be permitted to develop at the expense of freedom and human dignity, or to the detriment of the national economy ..."

169. Article 13 of the Constitution of Iraq stipulates that natural resources and basic means of production are owned by the people and exploited directly by the central authority in the Republic of Iraq in accordance with the exigencies of public planning of the national economy.

170. The Syrian Arab Republic stated that its Constitution and other legislation confirmed that every person was fully entitled to own property alone as well as in association with others, in such a way as to help to ensure the achievement of socio-economic development objectives, as stipulated in article 17 of the Universal Declaration of Human Rights and again in article 11 of the Declaration on the Rights of Disabled Persons.

171. The office of the Under-Secretary-General for International Economic and Social Affairs stated that the right to own property alone as well as in association with others contributed to the development of individual liberty and initiative and served to foster, strengthen and enhance the exercise of other human rights and fundamental freedoms. The degree to which the right to own property contributes to the achievement of other objectives depends very strongly on the extent to which the right is enjoyed in practice by individuals. One limit to such ownership is when Governments as instruments of society own all property or all property useful in earning a livelihood. Such monopoly in the ownership of property leads demonstrably to the reduction of individual liberty.

172. In the view of the Christian Democrat International, the innate right of individuals to exercise the free economic activity that has enabled them to reach their current level of progress is the essential basis for the right to development, because there can be no development unless people can engage in economic activity, unless their talents can flourish, and unless individuals can work diligently in a State which gives its entire support to the integral development of the nation.

173. The individual incorporated in a State needs a property sphere that is strongly protected in legal terms so that he can live among his fellow citizens as an individual, i.e. freely and bearing responsibility for himself, and does not become a mere pawn of excessively powerful State authority. However, the right to own property is exercised by only a few or a limited number of individuals in many societies. It is remarkably unequally distributed. Therefore poverty, as an accumulation of privations and dependence, is often related to human rights violations, insults to human dignity; full dependence on the goodwill of others in economic, social, political and cultural matters leads to discrimination and undermines human existence.

174. Notwithstanding those negative effects, the right to own property is essential in stimulating individual initiative necessary for the economic, social and political growth of society as a whole. Only by involving every person in the creative process will conditions be established for the individual's participation in society and its economic system, promote human rights, give the individual the means to live independently, grant greater freedoms and open opportunities for all to acquire income and wealth.

175. It may be assumed that the process of economic reform and structural adjustment, with its increased reliance on market forces, will enhance economic performance, improve the efficiency of the public and private sectors, respond better to the needs and wishes of individuals and will uphold human dignity.

176. However, there is some doubt about the positive impact of the above-mentioned aspects of privatization on human rights, expressed by Mr. Danilo Türk, Special Rapporteur of the Sub-Commission on the realization of economic, social and cultural rights. He stated that:

> "If there is one predominant theme which runs through all adjustment programmes, it is the strong belief of those sponsoring the adjustment process that the State in question should give substantially greater control to the private sector. While privatization may affect many areas, its human rights implications, as well as its impact upon the provision of social services, are particularly interesting themes for analysis.
>
> Privatization has been particularly advocated by the World Bank and IMF as a solution to the economic problems confronting Africa. However, while there is a need to streamline the often huge public sector, and to remove waste and inefficiency, there are increasing doubts as to the efficacy of privatization in this continent. Some studies point to difficulties in implementing such initiatives owing to the scarcity of private entrepreneurs with the capital and experience required to take over large enterprises, as well as the absence of organized equity markets ...
>
> It seems fair to state that the 'free market' has never had the capacity or capability of creating conditions wherein the economic, social and cultural rights of all citizens were met and fully realized." 30/

177. The experiments in expanded capital ownership taking place in some parts of Latin America demonstrate the importance of private ownership and property rights. Through profit-sharing in the form of stock distribution, employees in industrial and agricultural enterprises gain a stake in the success of their economic system, which in turn leads to increased productivity. Through expanded capital ownership schemes, economic leaders break down rigid patterns of economic activity that restrict ownership to a small group or class of the people. This is done in a manner that respects and strengthens the principle of ownership, of private property, and individual responsibility. Instead of narrowing the economy's base of support to an unstable few or concentrating its power unproductively in the state bureaucracy, this approach broadens the

economic foundations and diffuses economic power throughout the system. The expanded capital ownership approach is one technique, among others, that illustrates the principles and concepts through which democracy can build a firm social foundation for economic cooperation and growth and create better conditions for realization of human rights.

178. While the most appropriate means of achieving the full realization of all human rights, including the right to own property, varies significantly from one State to another, measures designed to promote it may include privatization and a mix of public and private sector measures considered appropriate in a given State or a group of States and recognized by the international community.

III. THE LEGAL PROTECTION OF THE RIGHT TO OWN PROPERTY AND ITS IMPLEMENTATION

A. Legal protection of the right to own property

179. A number of universal and regional human rights instruments of legally binding character and declarations recognize the right to own property. It may be noted that this right is formulated according to the main purposes of each of those instruments.

180. Among them the Universal Declaration of Human Rights attains special importance as it represents an authoritative catalogue of fundamental human rights. Although it was adopted as a non-binding instrument, it set forth universal standards which became rules of customary international law and which as such were regarded as mandatory in the doctrine and practice of international law.

181. The Universal Declaration was proclaimed "as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society ... shall strive ... to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition ...".

182. The complete set of rules to promote and protect the human rights of individuals developed with the adoption of legally binding instruments which converted almost all of the principles of the Universal Declaration into legally binding norms. The right to own property has also acquired its mandatory legal character, having been included in the treaties analysed above.

183. The Universal Declaration has had a significant impact in shaping the formulation of regional instruments and national constitutions and laws, and in incorporating into them provisions aimed at protecting the right to own property as a human right.

184. Egypt stated that its signing of the Universal Declaration of Human Rights had the effect of making that Declaration and its provisions a part of its internal legislation. Since article 17 of the Declaration provides that everyone has the right to own property alone as well as in association with others and that no one shall be arbitrarily deprived of his property. Egypt's adherence to that principle has been incorporated into its Constitution. The Constitution enshrines that right and treats it as a basic constitutional principle, and the legal system has established means of legislative protection such as to ensure that that right is maintained and not infringed.

185. In the preamble to its Constitution, Senegal solemnly proclaims its attachment to fundamental rights as defined in the Declaration of the Rights of Man and of the Citizen, of 1789, and in the Universal Declaration of 10 December 1948. Thus, the right to own property is guaranteed and respect for that right is proclaimed.

186. Most modern constitutions recognize this right which is implemented by further legislative and administrative measures. All States also pursue policies directly affecting the realization of the right to own property.

187. The right to own and enjoy property is a basic element of the common law and statutory law of Canada. The right to enjoyment of property is also protected at the federal level by the Canadian Bill of Rights. It specifically provides, in respect of all federal laws, that individuals have the right to enjoyment of property and the right not to be deprived thereof except by due process of law.

188. The Constitutions of Costa Rica, Denmark and Qatar provide for the inviolability of the right to own property. Some other States in their constitutions also stipulate that individual and collective ownership of property shall be inviolable and that such property shall not be expropriated except in the public interest and in accordance with the law.

189. The purpose of the guarantee of property by the German Basic Law is to ensure a measure of freedom enabling the individual to shape his life and his own responsibility. At the same time the individual is guaranteed the right to participate, on his own responsibility and on the basis of private use, in shaping the country's legal and social order.

190. According to article 14 of the Constitution of Argentina, "all inhabitants of the Nation" enjoy, among others, the right to use and dispose of their property. And according to article 20, foreigners in Argentina "may engage in their industry, own real property, purchase it and alienate it".

191. Article 63 of the Constitution of Algeria states that every citizen has the duty to protect public property and the interests of the national collectivity and to respect the property of others.

192. Article 16 of the Constitution of Iraq stipulates that private property and individual economic freedom are guaranteed within the limits of the law on the understanding that they must not be exploited in a manner inconsistent with or detrimental to public economic planning.

193. The Constitutions of Argentina, Cameroon, Costa Rica and Egypt provide for the protection of intellectual property. The Constitution of Bolivia stipulates in its article 12 that the State does not recognize the latifundio, i.e. the large estate comprising substantial rural property.

194. In providing for the right to own property, the Constitution of Portugal enshrines the right of private persons to acquire goods or patrimonial rights. These persons, natural or legal, have the right to own goods as property and, in general, the right to become, through acts inter vivos or mortis causa, the holders of any right having pecuniary value, such as credit rights, royalties, social rights, etc. Patrimonial rights are not, therefore, exclusively reserved for the State or the Community but may also be held by private persons.

195. Although the United States Constitution does not explicitly confer upon individuals the right to own property alone or in association with others, several provisions of the Constitution implicitly assume the existence of this right and limit the power of the Government to interfere with individuals in the exercise of this right. In particular, the fifth amendment to the United States Bill of Rights and the fourteenth amendment to the United States Constitution include requirements that no person shall be deprived of life, liberty and property without due process of law.

196. Article 14 of the Constitution of Cuba states that in Cuba the socialist system of economy applies, based on the entire people's socialist ownership of the means of production and on the abolition of the exploitation of man by man. The procedure and types of socialist state property are enumerated in article 15 of the Constitution.

197. In Mexico the law is required to protect land for human settlement, and to regulate the use of communal lands, forests and waters and the necessary development measures to raise the standard of living of community members, on the basis of respect for a stronger communal life in the ejidos (communally held lands) and communities. The law is required to regulate the exercise of the rights of community members over land and of each member of the ejido over his plot, with due respect for the wishes of the members of the ejido and community to choose the most suitable means of using their productive resources. The law is also required to establish procedures whereby the ejido and community members can enter into association with one another, with the State or with third parties and decide on land use, and in the case of ejido members, transfer their rights over a plot of land among the members of the family unit; it is also required to determine the conditions and procedures for the ejido assembly to grant ownership of his plot to each ejido member. When plots are transferred, the right to preference laid down by law shall be observed.

198. The independent Expert has not received any reply from Governments of the Eastern European States where dramatic changes in the domain of ownership are taking place. However, some materials are available which illustrate the process of privatization in those States. Whereas progress with privatization in the former Soviet Union has to date remained limited, the ambitions for the near term are considerable. They include the creation of a legal framework and institutions to enact various forms of privatization. For instance, in October 1993, President Boris Yeltsin decreed that all Russians have the right to sell, bequeath and mortgage property.

199. The results of rapid progress in 1992 were more favourable for Czechoslovakia and Poland, whose voucher-type privatization programmes should give privatization a major impetus in the course of the year. Hungary has also introduced measures that have accelerated privatization of assets. 31/

200. In the Baltic republics, notably in Estonia and Latvia, progress is more limited because they adopted a policy of proceeding slowly with divestment of large assets. In the republics that constitute the Commonwealth of Independent States (CIS) an acceleration of privatization has been transformed

from a policy intention to the implementation of concrete programmes. However, there are forces offering great resistance to reforms and the economies of a number of former Soviet republics are in ruins.

201. As a result of aforesaid processes the new constitutions, amendments to them and draft constitutions of the former socialist States introduce or envisage the introduction of radical changes in the political system and socio-economic relations. The emphasis has been placed on a socio-economic system resulting in a broad conceptual transformation of socio-economic relations. This has been done through the orientation towards a market economy based on the free play of market forces. This means that the organizational forms of economic activity, attracting private financial resources of citizens and foreign capital, the introduction of new forms of ownership and the systems of allocation, use and management of the socially owned means of production are now systematically functions of the market and a market-based economy.

202. In the field of property-legal relations the new legislation provides or draft laws envisage qualitatively and quantitatively new solutions concerning the right of citizens to own buildings, apartments, means of production, business premises and agricultural land.* These solutions constitute an entirely new attitude of society towards the size of property owned by citizens. Citizens are guaranteed the right of ownership over the means of production, business buildings and premises, apartments and houses, without any quantitative restrictions. This means that the extent of the right to own property in this field is practically unlimited, i.e. that citizens have the right to own any number of houses, apartments, business buildings and premises and means of production.

203. In view of the above solutions, it is clear that the constitutional changes, those already made and those under way, speaking in very general terms, tend to rehabilitate private ownership, i.e. the private sector in the structure of production relations. Moreover, in this process the right to own property is particularly emphasized as a right contributing to the realization of economic and social development as well as to the promotion of other human rights in those countries.

204. While relevant constitutional provisions affirm respect for the right to own property, as illustrated above, States' laws, as inspired by their constitutions, are designed to provide for a detailed and harmonious regulation of that right. On the other hand, as article 30 of the Constitution of Colombia stipulates, private ownership and other rights acquired under due title in accordance with civil law by individuals or bodies corporate are guaranteed and may not be disregarded or disturbed by subsequent civil laws.

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* The legal framework for land privatization is limited in the Baltic States and especially in the States belonging to CIS.

205. As far as legislation is concerned, an attempt at analysis will be undertaken in the next chapters and subchapters dealing with concrete issues of legislative regulation in this field. However, it should be pointed out that an ever-increasing number of States maintain policies and legislation directly and more positively affecting the realization of this right.

206. For example, the provisions of the Civil Code of Egypt (arts. 802 et seq.) establish and regulate the right to own property. Within the limits of the law, the owner of any thing is alone entitled to use, enjoy and dispose of it, meaning both the entire thing owned and those of its essential elements which cannot be separated therefrom without its being damaged or destroyed.

207. In former socialist States and in a number of developing countries the constitutional principle concerning the plurality of ownership forms have required legislative regulation through the establishment of an equal material-legal regime for all forms of ownership, by ensuring the legal security of the owner and the inviolability of his proprietary rights with a view to creating material interest and stimulation for production-oriented and other forms of engagement of his own property, by introducing an appropriate, more liberal proprietary-legal regime for foreign physical or legal persons participating as owners or founders of companies, investors and licence-holders, etc., in their economic systems; by eliminating institutional (administrative, etc.) and other restrictions in the sphere of proprietary-legal relations; by abolishing the established maximum of privately owned immovable property; and by making possible free enterprise.

208. Considering that some of the above-mentioned, and some other no less important, questions in the sphere of proprietary-legal relations require very complex legislation which cannot be incorporated only in the law on basic proprietary-legal relations, extensive legislative activity in the majority of those States was or is now under way to draft pertinent laws on property (and other rights) under which the principles of an equal status for all types of property, legal protection in the acquisition, disposal and sale of property as well as the abolition of all institutional prohibitive rules, preferring one type of property over the others, will be much more recognized. The principles contained in article 17 of the Universal Declaration of Human Rights and in other instruments of the United Nations and the organizations of the United Nations system binding upon the States parties will thus find their meaning and justification in the proprietary-legal systems of the States concerned.

209. With respect to that process in some countries it was stated as follows:

> "Yet, whereas there may be some setbacks and delays, the negative experience with spontaneous privatization and the bandwagon effect that the experience of the east European countries exerts are such that, barring serious sociopolitical conflict or complete economic chaos, some of the policy intentions will undoubtedly be carried out. The more ambitious agendas will probably have to be revised, even those that envision a more modest effort than the Russian Federation. But if the CIS republics that have not yet moved ahead with privatization at all succeed in getting the process under way that in itself would signal real progress after the past delays and failures." 32/

210. In any case, it may be appropriate to retain that neither privatization nor its accompanying economic changes carried out, inter alia, by adoption of necessary legislation can be pursued solely for economic reasons. It must be part and parcel of the enjoyment of human rights, in particular the right to housing, to the ownership of the land, to security of person, the right to participate in these processes and the subsequent realization of several additional rights.

B. Measures of implementation and realization

211. The United Nations General Assembly and the Commission on Human Rights have provided for about a decade continuing supervision of the realization of the right to own property under a general system of periodic routine reviews of information received from all reliable sources, including reports from States, intergovernmental and non-governmental organizations.

212. However, it should be noted that a relatively small number of Member States, intergovernmental and non-governmental organizations provided information on the subject. Almost no Member States, except Cuba, the Netherlands, Poland and the United States of America, have demonstrated a particular interest in the consideration of this issue at the forty-eighth and forty-ninth sessions of the Commission on Human Rights.

213. Therefore, the Expert strongly believes that these two main organs of the United Nations should give greater consideration to the right to own property in the context of ongoing human rights endeavours. It will promote better understanding of the interrelation and interdependence of this right and other human rights, and thus may give an incentive to its implementation.

214. In addition, there are now a number of special bodies, established in accordance with international conventions dealing with particular aspects of human rights, which devote full time and attention to monitoring the implementation of the provisions of those conventions. With respect to the right to own property, among such bodies are the Committee on the Elimination of Racial Discrimination, the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women. The factor common to all three is that they have a system of reviewing periodic reports submitted by Governments.

215. Member States of the International Labour Organisation undertake to submit three categories of reports: information concerning the measures taken to bring the Conventions and Recommendations before the competent authorities, reports on ratified conventions, and reports at intervals requested by the ILO on unratified Conventions and on Recommendations. Member States must communicate each of these reports to national workers' and employers' organizations for their comments.

216. The ILO has established two monitoring bodies responsible for considering Governments' reports. An examination of the reports is first carried out by the Committee of Experts on the Application of Conventions and Recommendations which is composed of 20 independent experts. It prepares an annual report on the situation in member States with regard to the implementation of international labour standards.

217. In the second stage, the Conference Committee on the Application of Conventions and Recommendations, a tripartite political body, examines the reports. It first discusses the ratification and implementation of standards by member States and the general surveys on selected unratified Conventions or Recommendations. It then examines individual cases, selecting only the most serious ones. It finally prepares a general report, including a special list mentioning the most serious cases.

218. The Committee on the Elimination of Racial Discrimination regularly considers issues of inadmissibility of discrimination on the basis of property ownership in connection with the implementation of article 5 of the Convention. Many States reported that they have enacted new legislation to give effect to the provisions of various sections of article 5. Pressure has also been applied to many States to get them to attend to the standards specified in this important article. 33/

219. An example of this might be the consideration of States' reports during the thirty-ninth and fortieth sessions of the Committee. Dealt with were the right of individual indigenous communities in respect of land ownership in Argentina; the implementation of the right to own property in Cuba; the acceleration of land claims settlement concerning indigenous people in Canada; the action taken by the Commission for Racial Equality in cases of discriminatory practice by estate agents in the United Kingdom of Great Britain and Northern Ireland; the access to housing by Bulgarian citizens of Turkish, Muslim or Gypsy origin; and with other similar issues. 34/

220. A number of States parties have formally informed the Committee that necessary changes were introduced into their legal or administrative systems in response to the Committee's recommendations. In a few instances, some States parties have consulted the Committee in advance about contemplated changes in their legislation or in their administrative practice and stated that they would take the Committee's advice into serious consideration before giving final form to those proposed changes. 35/

221. The Committee on Economic, Social and Cultural Rights, during its consideration of article 11 of the International Covenant on the right to an adequate standard of living, considers the right to adequate housing, including such aspects as number of adequately housed, number of homeless, space provided, race equality, and related issues, in particular legal protection against arbitrary or any other type of eviction.

222. The Committee also examines the implementation by States parties of the right to intellectual property recognized by them under article 15: the right to take part in cultural life and to enjoy the benefits of scientific progress and to benefit from the protection of the interests of authors.

223. The Committee adopted its General Comment No. 4 on the right to adequate housing, in which it stated as follows: "In some instances, the reports of States parties examined by the Committee have acknowledged and described difficulties in ensuring the right to adequate housing. For the most part, however, the information provided has been insufficient to enable the Committee to obtain an adequate picture of the situation prevailing in the

State concerned. This General Comment thus aims to identify some of the principal issues which the Committee considers to be important in relation to these rights." 36/

224. In the Committee's view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head, or which views shelter exclusively as a commodity. Rather, it should be seen as the right to live somewhere in security, peace and dignity. The Committee worked out the concept of adequacy. While adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, the Committee believed that it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context. They include the following:

(a) Legal security of tenure;

(b) Availability of services, materials, facilities and infrastructure;

(c) Affordability;

(d) Habitability;

(e) Accessibility;

(f) Location;

(g) Cultural adequacy. 37/

225. The Committee on the Elimination of Discrimination against Women reviews the implementation of the right to own property while considering States' obligations under articles 11 and 16 of the Convention. In this connection the following issues have been dealt with: existing legislation to guarantee equality of women in the private sector; an equal share of the property jointly acquired during marriage; discrimination against women in respect of property rights in some African and other States.

226. The European Convention, in article 14, provides that the enjoyment of rights and freedoms set forth in the Convention shall be secured without discrimination on any ground, including property. This article and article 1 of Protocol I were invoked by the Commission on Human Rights and the European Court of Justice to deal with the individual petitions concerning the alleged violations of the right to own property mainly in connection with the right to compensation as a result of the deprivation of one's property. 38/

227. The American Commission on Human Rights considers from time to time the implementation by States of their obligations in respect of ensuring the right to own property.

228. As far as the monitoring bodies established under universal conventions are concerned, a major shortcoming of the reporting procedure, experienced by them, is the limited number of responses received from Governments and the "rosy" picture often painted in their reports. In order to solve this and

other related problems the monitoring bodies have emphasized the importance of sending written reminders, drafting the general comments and establishing direct contact with the representatives of the Governments concerned.

229. Because of heavy agendas and lack of sufficient resources, most of the monitoring bodies lack the necessary time and budget to consider in-depth reports on the implementation of international standards. These monitoring bodies do not pass judgements on the performance of Member States, but rather attempt to establish a constructive dialogue with the Governments concerned. To facilitate such dialogue and preserve its impartiality most monitoring bodies are therefore composed of independent experts.

230. However, in the view of the independent Expert, the most effective implementation of human rights requires an interplay between international obligation and domestic commitment. It will be even more efficacious if the international treaty requires domestic laws and regulations to be altered to comply with the obligations undertaken, and if a State party is required to provide a remedy for any of the rights violated. The provision of local remedies is a key element in the implementation of rights. While the content of rights may be set at the individual level, individuals should be able to enjoy them - and to ensure that enjoyment - locally. The routine provision of remedies by the local courts, administrative tribunals and other organs of authority is the most effective guarantee.

231. The information available allows us to assume that some States have taken effective measures to protect the right to own property in their legislation and by the courts. They also established an effective recourse which an individual who considered that his rights have been violated could use.

232. The Egyptian Constitution includes provisions for the protection of this right. Article 34 states that "private property shall be safeguarded and may not be sequestered other than in cases specified by law and by means of a judicial decision".

233. Egypt's Supreme Constitutional Court plays its part in protecting these constitutional principles. When a law diverges from any one of these principles the judgements of the Court ensure that the unconstitutional provision is rescinded. The means of recourse open to an owner whose property is subject to interference is to initiate an action in respect of his entitlement by making a claim against the party which had infringed his ownership of the thing owned.

234. The progressive regulation and protection of the right to own property requires that it should be accorded criminal protection. Accordingly, the Criminal Code of Egypt regards certain acts considered by the legislature as being prejudicial to the right of individuals to own property as criminal offences. The Code of Criminal Procedure also contains a number of guarantees to safeguard and protect the constituent elements of this right.

235. The Egyptian legislature has imposed the penalty of imprisonment for the fraudulent possession of movable property with the intention of stealing it, and has penalized the misappropriation and dissipation of movable property entrusted to the offender in one manner or another by its owner or possessor

(arts. 336 et seq.). In directly criminalizing encroachment on the private property of individuals, the legislature has penalized the destruction and damaging of agricultural implements and livestock enclosures (art. 354), encroachment on animals owned by others (art. 355), damage to any area peripheral to the property of others that is under crops (art. 358) and the removal of property lines and boundary markers. It has imposed penalties for damage to movable and immovable property owned by others in such a way as to render it unserviceable (art. 361) and has penalized the destruction of goods, effects or crops owned by others (art. 366). 39/

236. The Government of Costa Rica stated that in respect of the acceptance of the various manifestations of ownership of property or of "ownerships", its jurisprudence not only shared the modern theory but also justified the need to treat each case of ownership separately, on the grounds that there is a diversity of principles underpinning the manifestations. This means that the idea that there is a single regime applicable to property has become outmoded since, reflecting the diversity of this legal institution (agrarian property, urban property, forest property, etc.), the legal regimes will be adapted to the subject of their regulation.

237. It seems important to protect citizens against the use of private property by Governments. In this connection, it may be noted that the Third Amendment to the United States Constitution prohibits the Government from quartering troops in private homes without the consent of the owner. The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. Finally, the Fifth and Fourteenth Amendments prohibit the Government from depriving persons of life, liberty, and property without due process of law.

238. In the United States Federal system, the regulation of private property rights falls chiefly to State and local governments. As a result, the laws pertaining to the acquisition, use, and disposal of property vary from location to location. The common law developed and applied by State and local courts also figures prominently in this field. In general, however, all jurisdictions within the United States recognize and protect the right of individuals to own property alone and in association with others.

239. It is also worth noting that some States have standing legislation and practice that direct economic assistance and military aid to be tied to human rights compliance. A part of international assistance and States' foreign aids programmes involve the promotion of private property rights as a whole and development of housing and human settlements in particular.

240. Many aspects of the United States' foreign aid programme involve the promotion of private property rights and the adoption of policies that encourage the expansion of popular participation in economic growth and development and broaden the base for sustained economic growth in developing countries. Critical to promoting broad-based economic growth at all levels in a society is the adoption of policies that let market forces - and individual initiative - work to generate growth.

241. The United States also seeks to spread business ownership more widely among the public, which increases the probability that business ownership will not be confined to a small number of wealthy families or to big industrial financing conglomerates. A larger number of citizens in a developing country will thereby have an opportunity to participate in, and enjoy the benefits derived from, the growth of their country's economy.

242. With respect to assistance in ensuring the right to adequate housing, the following was pointed out:

> "Traditionally, less than five per cent of all international assistance has been directed towards housing or human settlements, and often the manner by which such funding is provided does little to address the housing needs of disadvantaged groups. States parties, both recipients and providers, should ensure that a substantial proportion of financing is devoted to creating conditions leading to a higher number of persons being adequately housed. International financial institutions promoting measures of structural adjustment should ensure that such measures do not compromise the enjoyment of the right to adequate housing. States parties should, when contemplating international financial cooperation, seek to indicate areas relevant to the right to adequate housing where external financing would have the most effect. 40/

243. It is felt that such requests should be fully applicable to international cooperation and assistance in the implementation of the right to own property in all its aspects.

IV. LEGISLATION, POLICY AND PRACTICAL MEASURES OF STATES RELATING TO PROPERTY RIGHTS

A. Recognition by States of many forms of legal property ownership - private, State, communal and social forms

244. In its resolution 45/98 of 14 December 1990, the General Assembly, recognizing the value of constructive dialogue in the national context on the ways and means by which States can promote the full enjoyment of the right of everyone to own property alone as well as in association with others, considered that further measures might be appropriate at the national level, consistent with national policies, to ensure respect for the right of everyone to own property alone as well as in association with others and the right not to be arbitrarily deprived of one's property, as set forth in article 17 of the Universal Declaration of Human Rights, so as to protect and preserve these rights in relation to the following types and property: (a) personal property, including the residence of one's self and family; and (b) economically productive property, including property associated with agriculture, commerce and industry. The Assembly urged States, therefore, in accordance with their respective constitutional systems and the Universal Declaration of Human Rights, to provide, where they have not done so, adequate constitutional and legal provisions to protect the right of everyone to own property alone as well as in association with others and the right not to be arbitrarily deprived of one's property.

245. On the basis of information received by the Centre for Human Rights from the States and provided to the independent Expert together with other materials, it should be pointed out that the majority of Governments reiterate their commitment to support and promote the respect for right to own property. Their constitutions and other laws have guaranteed the right of property and that it has been at the core of the development of civil and political rights.

246. The Constitution of Algeria, for example, includes provisions that "public property is an asset of the national collectivity", that "every citizen has the duty to protect public property and the interest of the national collectivity and to respect to property of others".

247. In the information received from the Government of the People's Republic of China, it was indicated that under the Constitution and civil law, China acknowledges the following statutory forms of ownership: (1) public (State); (2) collective; (3) individual; (4) private. The four forms exist side by side, but public (State) and collective ownership are predominant. China is gradually offering part of its publicly (State) owned housing stock for sale to individual citizens. A few small industries and businesses not suitable for public (State) ownership have been offered for sale to individual citizens and communities. Not all publicly (State) owned property, however, is being privatized. Its role is, through far-reaching reforms, being expanded. Publicly (State) owned industrial enterprises are being converted to contractual operations and turned into stock issuing companies; Government and business are being separated as business methods are transformed. They are being turned into genuine corporations and made to compete in the markets,

where the strong can prosper and the weak will go under, in order to make them more vigorous. The existence and development of a powerful publicly (State) owned economy favours the creation of infrastructure, the development of public well-being, the rationalization of industrial structure, and China's economic stability and harmonious growth as a large developing country. Giving prominence to public ownership promotes China's successful transition from a highly centralized, planned economy into a socialist market economy. After 12 years of reform efforts, 80 per cent of all goods in China are now regulated by the market. China's course of reform shows that there is no contradiction between treating public ownership as the main form and cherishing the individual citizen's right to own property: the two notions are mutually complementary and beneficial. This is plain not only from the above-mentioned expansion and increase of individually owned property, but also from the all-round growth and prosperity of mixed economies embracing both individual economy and private ownership.

248. Mexico indicated that the property regime regulated by article 27 of the Constitution, together with the individual and social freedoms guaranteed by the Constitution in the economic sphere and the power of the State to intervene in the economy, determine the semi-public nature of the Mexican economy. Article 25, paragraph 3, of the Constitution stipulates as follows: "The public sector, the social sector and the private sector shall contribute in a socially responsible manner to national economic development, without prejudice to other forms of economic activity that contribute to the development of the nation".

249. The Constitution of Bolivia devoted several articles to the right of property: "private property is guaranteed, provided that the use made thereof is not prejudicial to the collective interest. Expropriation is effected for reason of public benefit or when property does not fulfil a social purpose, authorized by law and with just compensation. Confiscation of property shall never be applied as punishment for political offences".

250. Swedish authorities informed the independent Expert that an extended and more general constitutional protection for ownership has been discussed in the Swedish Parliament from time to time. A parliamentary committee was appointed by the Government earlier in 1992 to, amongst other things, examine the question of such extended constitutional protection concerning ownership. Apart from the constitutional provisions referred to above, Swedish legislation and general policy-making recognize different forms of ownership. Real estate and other kinds of property may thus be owned by physical as well as legal entities, including private corporations, the Swedish State and local municipalities.

251. As of 19 July 1979, a number of legal instruments concerning the right to property were adopted in Nicaragua. The first were Decrees 3 and 37, which were used as the basis for confiscation of property belonging to the Somoza family and its associates, as well as property belonging to members of the National Guard. Subsequently, laws were passed providing for the transfer to the State of property of persons who had absented themselves from the country for more than six months (Absentees Law).

252. The Government of Morocco stated that the 1972 Constitution, like the 1962 and 1970 Constitutions before it, guarantees the right to own property, while article 15 nevertheless adds that "the law may restrict the extent and exercise of this right, if so dictated by the requirements of the Nation's planned economic and social development". The same provisions are contained in the Constitutions of Chad, Denmark, Bangladesh, Belgium, Japan, Yugoslavia and others.

253. The Government of Costa Rica reported that in accordance with the hierarchy of rules of law, the Constitution of 7 November 1949 is the foundation of the entire legislation on property which it governs in its article 45 as follows:

> "Property is inviolable: no one may be deprived of his property except in the public interest, legally proven, on the payment of due indemnification in accordance with the law. In the case of war or internal disturbances, it is not indispensable that the indemnification be paid in advance. However, the corresponding payment shall be made not later than two years after the ending of the state of emergency. For reasons of public necessity, the Legislative Assembly may, by means of a vote of two thirds of all its members, impose limitations on property 'for the social interest'. Legislation has centred on the scope of that rule, and national judicial decisions have interpreted the law in the light of the Constitution. In other words, the judicial decisions of the courts recognize the existence of individual private property but, side by side with this, a social share is understood; i.e. private property acquires a dual nature, individual and social."

254. As indicated in chapter I, the information received from Cuba illustrates several constitutional provisions relating to ownership of property. The procedures and types of socialist State property are then enumerated in article 15 of the Constitution. Article 25 authorizes the expropriation of property for reasons of public benefit or in the interests of society, subject to due compensation.

255. Article 14 of the Constitution of Iraq stipulates that the State encourages and supports all forms of cooperative ownership and cooperative activity in production, distribution and consumption.

256. The Government of the Republic of South Africa informed the independent expert that the question of the protection of the right to own property in a bill of rights is at present the subject of study and debate in South Africa.

257. Yugoslavia is undergoing a process of the transformation of social property into other forms of property - particularly mixed property with the possibility of further transformation towards total privatization or to State ownership, with the aim of achieving greater economic efficiency and productivity of this property in the conditions of market economy.

258. The current trend in Senegal is to reduce the sphere of State ownership. Thus, it has been decided to privatize a number of enterprises within the semi-public sector and a large number of State-owned shares have been offered for sale to the public.

259. The political changes and economic reform carried out in Eastern European countries since 1989 introduced a new element with respect to property rights and to privatization programmes of State assets (land, plants and equipment, housing, infrastructure, financial institutions, public utilities and others). Therefore, it may be noted that the property rights reform and privatization programmes in these countries, including the Russian Federation, are two core components of transformation policies of post-communist societies, the integral component of the measures to sensitize societies to market incentives.

260. The new policy and modern legislation enacted since 1989 on private property rights in Hungary, for example, which dealt with the privatization of large companies involved the establishment of corporations and the co-opting of new owners. The deconcentration of the large conglomerates led to the creation of subsidiaries or the partial divestment of production units, thus forging further cross-ownership relationships.

261. Romania's law on privatization embodies a voucher-type scheme with a unique feature: free distribution of so-called property certificates to all adults. It is estimated that about 17 million individuals will be eligible for this free distribution.

262. In Albania, given the poverty of the country and the urgency of starting market-type relations, the authorities have been considering a rapid and massive transfer of title to citizens, including distribution free of charge. In spite of the chaotic conditions in Albania, the Government reported in early 1992 that very rapid progress had been made with privatization in retail trade, handicrafts and communal services. In 1993, the Government of Albania expressed its intention to start the full privatization of its economy.

263. The Russian Federation and the Ukraine are at present moving forward with privatization through a voucher-type scheme. But even in Russia, despite a courageous privatization programme, it seems that they have not hit bottom yet. In the Ukraine high inflation, a negative growth rate and a sharp deterioration in the standard of living are not only side-effects but also a result of mismanagement of the restructuring of a planned economy. In particular, the selling of State-owned firms, which is picking up speed in Russia and booming in much of Eastern Europe, is practically a non-starter in Ukraine.

264. In Lithuania, vouchers have already been distributed to all citizens. They will eventually be utilized for distributing ownership of about one fifth of public property free of charge. This is estimated to be approximately equivalent to two thirds of the asset value of industrial firms for privatization.

265. Poland initially opted largely for sale of assets. The decision to redirect the emphasis to mass privatization, after a disappointing first year of divestment, was based on two basic postulates. One was that public wealth was owned by the entire society because it was produced by its toil. The other was that an economy which belongs to all in practice belongs to no one and that the creation of owners was critical to progressing towards an effective market economy. 41/

266. Privatization is probably the most important and the most difficult element in the transformation process of the economies in Eastern Europe and especially in the former Soviet Union. There the bulk of the large industrial enterprises is still owned by the State. As was rightly pointed out, even if a large company is not expected to be profitable in the future, it may be socially inefficient to shut it down immediately. That high unemployment rates and the economic desolation of entire regions may have considerable external effects and produce social and political unrest which may jeopardize the transition process as a whole should be taken into account. 42/

267. The new approach made by the Eastern countries in full recognition of all forms of property rights, in law and in fact, demonstrates their readiness to establish a pluralistic society and give impulse to implanting democracy as the core principle of socio-political organization.

B. Intellectual property

268. Intellectual property is protected by law in most countries in order to encourage creativity and the application of its results and to foster fair trading, which in turn contributes to economic, social and cultural development.

269. Intellectual property is usually divided into two branches, namely industrial property and copyright.

270. The Convention establishing the World Intellectual Property Organization (WIPO), concluded in Stockholm on 14 July 1967, provides that "intellectual property" shall include rights relating to:

(a) Literary, artistic and scientific works;

(b) Performances of performing artists, phonograms and broadcasts;

(c) Inventions in all fields of human endeavour;

(d) Scientific discoveries;

(e) Industrial designs;

(f) Trade marks, service marks and commercial names and designations;

(g) Protection against unfair competition and other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

1. Industrial property

271. The expression "industrial property" is sometimes misunderstood as relating to movable or immovable property used for industrial production, such as factories, equipment for production, etc. However, industrial property is a kind of intellectual property and thus relates to creations of the human mind. Typically, such creations are inventions and industrial designs. Simply stated, inventions are new solutions to technical problems, and

industrial designs are aesthetic creations determining the appearance of industrial products. In addition, industrial property includes trade marks, service marks, commercial names and designations, including indications of source and appellations of origin, and the protection against unfair competition. Here, the aspects of intellectual creations - although existent - is less prominent, but what counts here is that the object of industrial property typically consists of signs transmitting information to consumers, in particular as regards products and services offered on the market, and the protection is directed against unauthorized use of such signs which is likely to mislead consumers, and misleading practices in general.

272. The expression "industrial property" may not appear to be entirely logical because it is only as far as inventions are concerned that the main segment of economy that is interested in them is industry.

273. The laws of a country relating to industrial property are generally concerned only with acts accomplished or committed in the country itself. Consequently, a patent, a trade mark registration or the registration of an industrial design is effective only in the country where the government office effected the grant or the registration. 43/

274. It was in order to guarantee the possibilities of obtaining protection in foreign countries for their own citizens that, in 1883, 11 countries established the International Union for the Protection of Industrial Property by signing the Paris Convention for the Protection of Industrial Property*.

275. The substantive provisions of the Convention fall into three main categories: national treatment, right of priority, common rules.

276. The Convention leaves every contracting State free to legislate as it wishes in industrial property matters. In particular, each State is free: to exclude from patentability inventions belonging to certain fields of technology; to decide whether patents should be granted with or without an examination as to their novelty and other criteria of patentability; to fix the duration of patents; to decide whether the right to a trade mark may be acquired by use or registration; to decide whether registration of trade marks and industrial designs should be effected with or without an examination to determine whether they conflict with existing registration; to fix the duration of the protection of industrial designs; to fix all the details of procedure and administration.

277. As to the information received by the independent Expert from some States, the national legislation protects the industrial property of their citizens and organizations. For example, the Swedish Government pointed out that there was extensive and elaborate legislation for the protection of industrial property, such as inventions, industrial designs and trade marks.

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* The Convention was revised at Brussels in 1900, in Washington in 1911, at The Hague in 1925, in London in 1934, at Lisbon in 1958 and at Stockholm in 1967, and it was amended in 1979.

The field of industrial property in ex-Yugoslavia was regulated by federal lawin accordance with the provisions of the Paris Convention on the Protection of Industrial Property and some other conventions ratified by former Yugoslavia. By this law, the authors were recognized in relation to the right to protection of inventions (patents), technical inventions, samples, models, stamps and trade marks.

278. The Government of Morocco also reported on the existing legislation as follows: "The dahir of 23 June 1916 relating to the protection of industrial property, as amended and supplemented, regulates, inter alia, an intangible element of business goodwill: industrial property. The dahir of 24 May 1955 relating to leases for buildings or commercial, industrial or craft premises sets out the conditions for access to commercial property, while the dahir of 31 December 1914, as amended and supplemented, concerns the sale and pledging of business goodwill."

279. The Government of Venezuela reported that there are also other laws relating to various forms of the right to own property, such as the Copyright Act, intended to protect the rights of authors over intellectual works, whether literary, scientific or artistic, regardless of their kind, form of expression, worth and purpose; and the Industrial Copyright Act, which regulates the rights of inventors, discoverers or innovators over their creations, inventions or discoveries in the industrial field, and the rights of producers, manufacturers or traders over their trade marks, slogans or signs adopted to distinguish their work or activity from similar ones.

280. Every country which gives legal protection to inventions - and there are about 140 such countries - does so through patents. Laws require that, in order to be patentable, the invention must be new, it must involve an inventive step and it must be industrially applicable. Furthermore, the laws of some countries exclude certain specific kinds of inventions from the possibility of patenting, for example, inventions which are incorporated in substances obtained by nuclear transformation. 44/ The laws of some countries provide that certain inventions - particularly domestic inventions concerning weapons - must be treated as secret. Applications concerning such inventions, and even patents for inventions concerning such inventions, are not published, and are treated by the Patent Office as secret without any time limit. 45/

281. The second of the two means of protecting inventions is called an "inventor's certificate". It is provided for in the laws of Algeria, Bulgaria, Czechoslovakia, Cuba, the Democratic People's Republic of Korea, Mongolia, the former Soviet Union and Viet Nam. Under the system of inventor's certificates, the enterprise whose worker made the invention usually cannot derive substantial benefit; in particular, it cannot ask for compensation from another enterprise when the latter uses the invention. As far as the inventor himself is concerned, his situation may be similar under both an inventor's certificate and a patent: in either case, the law should provide that he should receive an equitable remuneration from the entity for which he works. 46/

282. Industrial design is the ornamental or aesthetic aspect of a useful article. In order to be protectable, an industrial design must, according to some laws, be new and, according to other laws, original. They are usually protected against unauthorized copying or imitation. The protection usually lasts for 5, 10 or 15 years. The document that certifies the protection of an individual design may be called a registration certificate or a patent. 47/

283. A trade mark is a symbol which is intended to indicate who is responsible for the goods placed before the public. It may take many forms. Where a trade mark is used in connection with services, it may be called a "service mark". For example, service marks are used by hotels, restaurants, airlines, tourist agencies, etc. A trade mark has come to be recognized as a species of property which its owner can take steps to protect.

284. Trade names, or "commercial names and designations", constitute another category of elements of industrial property and serve to identify and distinguish an enterprise and its business activities from those of other enterprises. Trade names are generally protected under most national laws.

285. The final element of industrial property is protection against unfair competition. In different countries unfair competition law is composed of general constitutional and civil code principles, case law and special laws. It may supplement protection granted by special industrial property laws, in so far as it may provide for remedies in some cases where none are available under such laws. However, by prohibiting dishonesty in trade, unfair competition law can provide protection even in cases in which other branches of industrial property law do not provide for protection. 48/

286. Industrial property has long been recognized and used by industrialized countries, and is being used by an ever-increasing number of developing countries, as an important tool of technological and economic development.

287. It may be also noted that developing countries consider the private right to intellectual property as a creation of industrialized States, unsuited to the present international economic situation and as constituting an impediment to their own development. This view is based on the fact that the development and flow of knowledge or technology is unevenly distributed among the countries of the world since it is mainly concentrated in the industrialized countries of North America, Western Europe and Japan, while developing countries, which generate little technology themselves, rely on technology transfer from the industrialized States. This uneven distribution and dependence on industrialized countries is of concern to developing countries which, furthermore, believe that much of the transferred technology is unsuitable, obsolete and overpriced. They believe that technology which is already developed is part of the "human heritage" and should be freely available to all; that they have already paid for such technology through the exploitation of their natural resources by the industrialized countries.

288. It should be noted that several international organizations such as WIPO, UNCTAD and UNIDO provide development assistance programmes to developing countries. WIPO's development assistance programmes, for example, help developing countries to acquire foreign patented technology on terms favourable to them; to negotiate licence agreements; to locate technical

information contained in patent documents; to modernize domestic legislation and to accede to international treaties; to train persons from developing countries so that these countries have their own specialists in law, government and industry.

2. Copyright

289. Copyright relates to artistic creation such as poems, novels, music, paintings, cinematographic works, etc. In most European languages other than English, copyright is called author's rights.

290. The fixation of a work in a material form (writing, printing, photography, sound or visual recording, sculpture, painting, graphic reproduction, etc.) is not a necessary prerequisite of protection. However, certain countries, notably those that follow the Anglo-American legal system, require, mainly for reasons of proof, some fixation of the work before protection is assured.

291. Works may be published or not. The meaning to be given to the word "publication" has been the subject of a good deal of controversy. There is agreement in general on the fact that the distribution of the work has to be sufficient to meet the reasonable needs of the public, account being taken in that case of the nature of the work; the needs of the public are obviously not the same for books, for instance, as for recordings or films.

292. Copyright protection generally means that certain uses of works or certain related acts are unlawful except where the author or copyright owner has authorized them. These uses may, for instance, include the copyright or reproduction, in any manner or form, of any kind of work, the public performance of certain works such as musical or dramatic works or films, the broadcasting of all kinds of works by radio or television or other means and the adaptation of the work to another medium of mass communication. These uses are subject to prior authorization.

293. It is generally accepted that the whole set of prerogatives that constitute copyrights has to be recognized and protected at least throughout the life of the author. After his death, his work continues, in principle, to be protected for a certain time. The period is generally 50 years after the death of the author, or more, For instance, the Constitution of Colombia establishes, in article 35, paragraph 1, that literary and artistic property shall be protected in the same manner as transferable property, for the duration of the author's life and 80 years thereafter, through the procedures prescribed by law. In accordance with Act 23 of 1982, article 1, the authors of literary, scientific and artistic works enjoy protection for their works in Colombia. Legal protection is also enjoyed by the interpreters or performers of such works, by producers of recordings and broadcasting organizations, in matters of their rights vis-à-vis those of the author.

294. Swedish constitutional law contains some provisions relating to intellectual property. According to the Instrument of Government, chapter 2, section 19, "authors, artists and photographers shall own the rights to their works in accordance with the provisions laid down in law".

295. In Senegal, intellectual property is recognized and safeguarded. Act No. 73-52 of 4 December 1973 regulates protection of the property rights of the authors of any original literary, scientific or artistic works. It applies to the works of Senegalese citizens and to those of foreign authors provided the country of the foreign author grants equivalent protection to the works of Senegalese citizens.

296. In addition, Senegal has joined the African Intellectual Property Organization (OAPI) by signing the agreement establishing that body. In doing so, Senegal has undertaken to accede to the various international conventions.

297. The Government of Yugoslavia informed the independent Expert that the federal law regulated the moral and material rights of authors. As regards the protection of the so-called kindred rights, the federal law stipulates the protection of the rights of performers while the rights of the producers of phonograms and videograms and the rights of broadcasting organizations are not yet completely regulated which is the reason why Yugoslavia has not yet ratified the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

298. The law of copyright in the United States was closely based upon the original provisions in the English Statute of Anne of 1709 until 1976 when the current United States Copyright Act was enacted. It changed the duration of protection to the life of the author plus 50 years, thus bringing it into line with virtually all other countries with copyright laws; however, the 1976 Act still retains the requirements of registration and deposit which have their origins in the Statute of Anne of 1709.

299. In this connection it should be pointed out that the common law countries treat copyright, in effect, as a form of property, capable of being created by an individual or a copyright author and, once created, susceptible to commercial exploitation in the same way as any other form of property, the component rights being exclusively directed to securing enjoyment of the economic potential of the property.

300. In civil law countries the author's right is also regarded as having "property" characteristics, and the copyright law seeks to protect the economic content of the property to the same extent as does the common law system; but, and herein lies the difference, there is an added dimension to authors' rights - i.e. the intellectual or philosophical concept that the work of an author is an expression of his personality which by natural justice requires protection just as much as the economic potential of the work. 49/

301. Experience has shown that the enrichment of the national cultural heritage depends directly on the level of protection afforded to literary and artistic works. Encouragement of intellectual creation is one of the basic prerequisites of all social, economic and cultural development.

302. Copyright protection at the international level began by about the middle of the nineteenth century on the basis of bilateral treaties. The need for a uniform regime led to the formulation and adoption on 9 September 1886 of the Bern Convention for the Protection of Literary and Artistic Works by the contracting States, which formed themselves into a union in order to ensure

protection of the rights of authors of such works in the countries of the union. The universality of the Bern Convention is evident from the fact that its membership extends to all States in all continents.

303. Unlike most international conventions, which follow in the wake of national legislation and provide a synthesis of existing laws, the protection of neighbouring rights was sought to be established at the international level by the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations which was adopted in Rome on 26 October 1961. This Convention, known as the Rome Convention, entered into force on 18 May 1964.

304. An international attempt was made to provide legislation in developing countries with guidance in the form of a model law, which has since become known as the Tunis Model Law on Copyright. It was adopted in Tunis in February 1976 at the meeting of the Committee of Governmental Experts convened by the Tunisian Government with the assistance of the World Intellectual Property Organization and the United Nations Educational, Scientific and Cultural Organization and was attended by 27 governmental experts from Africa, Asia and Latin America.

305. The Tunis Model Law gives due consideration to the special interests of developing countries, both as regards the extension of copyright protection to fields of particular importance to them, on the one hand, and exceptions from protection where it would result in undue hardship to these countries, on the other.

306. Certain countries have established special funds, statutory or otherwise, for the purpose of direct assistance to artists, musicians, etc., or for taking measures conducive to the protection, encouragement and promotion of creative activities. Thus, besides protecting and administering the rights and legal interests of authors, their organizations could be assisted to provide the requisite social security and financial assistance in the case of sickness, accidents, permanent or temporary disability, etc. 50/

C. Legislation relevant to land use, distribution, allocation zoning and ceilings, expropriation, land-use planning

307. Most Governments consider the right of ownership and use of land as well as other natural productive resources as an essential and integral part of the protection of human rights and fundamental freedoms. Legislative bodies of these States adopted appropriate legal provisions in their constitutions and agrarian laws relating to agrarian reforms as well as land use in conformity with the principles of international human rights instruments. Nevertheless, implementation of these land rights met enormous difficulties and obstacles in many developing countries. This is, firstly, because the levels of absolute poverty together with deficient social infrastructure and almost complete lack of social service, tend to be the highest in rural areas; secondly, because rural workers tend to be particularly vulnerable to exploitative conditions of employment, including coercive recruitment and employment practices, dangerous and unhygienic working conditions, restrictions of freedom of association, child labour and unacceptable low wages; thirdly, because despite widespread pledges to enact redistributive reforms, the levels of land concentration and

landlessness are increasing year by year in all too many countries; fourthly, because even larger numbers of rural workers are being employed under unstable conditions, as seasonal or casual labourers in commercial agriculture, and are deprived of the social benefits granted by law to other workers. 51/

308. Although in Latin America and some other parts of the world obsolete land ownership systems were done away with, ownership of vast tracts of land was nevertheless preserved, thereby giving rise to latifundismo which maintained the political, social and economic sway of small privileged groups over the huge majorities. The latifundista system not only signified that these huge estates were owned by a small number, but also led to their neglect, as their owners felt no need to keep them regularly and rationally cultivated. Agrarian reform legislation endeavoured to come up with a solution to this phenomenon.

309. Some kinds of negative trends have been also noted in many regions, especially in Asia and Latin America, where Governments have adopted land reform legislation that in fact led to greater concentration of land ownership or to a grave fragmentation of land and, consequently, to greater levels of absolute rural landlessness or near landlessness, as well as to a reduction of productivity.

310. A comparative analysis of the national laws of some States from the point of view of their legal regulation of the right to land use gives evidence of the exclusion of women from land ownership. For instance, field research in Cameroon, organized by UNESCO, revealed that women were excluded from land ownership even after the introduction of a Western-type civil code, due to the coexistence of traditional land tenure and modern institutions. 52/

311. We can agree with the information of FAO that mere ownership of land does not, in most cases, attribute any value to the owner unless the utilization of land is complemented by supporting services, such as credit, marketing, input supply, processing, storage, etc. Without these, ownership of land may, in some cases, even have negative consequences. 53/

312. In the light of information received from States on the legislation, practical measures and rules relevant to land use, distribution and expropriations, the following may be noted.

313. The Cuban Constitution expresses the State's recognition of the right of small farmers to own their land and other means and implements of production, according to the stipulations of the law. It also authorizes the establishment of agricultural cooperatives in the cases and forms prescribed by law. Cooperative ownership constitutes a form of collective ownership on the part of the peasants belonging to those cooperatives.

314. In Costa Rica it is possible to speak of a single case of extraordinary usucaption, not in civil law but in agrarian law, where the proper conveyance deed is not demanded but usucaption is permitted and a written title recorded. This situation has resulted from articles 92 and 101 of the Lands and Settlement Act, No. 2821 of 14 February 1962 and its amendments. The manner of acquiring private property through usucaption results from the owner's inactivity or inertia. In other words, the concept of absolute private property, which does not disappear through non-use over a period of time,

clashes with the legal process which forms the subject of the judgement inasmuch as, in an agrarian context, property of agricultural significance can, by a special law, be acquired by a person who is not its owner but who uses it and produces from it. In this sense, the Court of Cassation gives a glimpse of the transformation of the classical concept of property and, at the same time, of the existence of not just one form of ownership but of various "ownerships" which by their very nature can be given different treatment "in tune with the conditions of mode life".

315. Act 5064 of 22 August 1972 includes, as one of the ways of acquiring property that has been declared of agricultural significance, positive prescription whose requirements are substantially different from those in the Civil Code in that no proper conveyance deed is required and the person concerned must have possessed the land only for a period of not less than three years during which he cultivated it. The property having been recorded as owned by the possessor, without prejudice to a third party having a better right, the award is confirmed once three years have elapsed from the date of registration without any objection having been received.

316. In accordance with Agrarian Reform Law of Bolivia, the State recognizes and guarantees private ownership of agricultural land where the ownership serves a useful purpose for the nation; it shall plan, regulate and rationalize exercise of such ownership and seek to distribute the land equitably so as to ensure the freedom and economic and cultural well-being of the Bolivian people (art. 2). Private ownership of agricultural land shall be recognized and vested in natural or juridical persons so that they may exercise their right in accordance with civil law and the provisions of this Decree-Law. The State shall recognize only the forms of private ownership of agricultural land specified in the following articles (art. 5). At the same time the Bolivian legislation pointed out that the State does not recognize the latifundio, i.e. the large estate comprising substantial rural property (of variable size depending on its geographical situation) which remains undeveloped or underdeveloped, under the extensive forming system, using outdated implements and methods and resulting in a waste of human effort, or because the land is leased out to produce income.

317. The Agrarian Reform Act determines the conditions for transforming the country's agrarian structure and for integrating the rural population into economic development by replacing the latifundista system by a fair system of land ownership, tenure and use, based on equitable distribution of land so that it will provide those who work it with a stable economic base as the foundation for gradual improvement of their social welfare and a guarantee of their freedom and dignity, as stated in article 1 of the Act.

318. Legislative norms of some countries assume the possibility to restrict or limit the ownership of private property, including the right of land use. For example, the Constitution of Madagascar stated that, according to the socialist ethic concerning the development of every individual, the right to personal property is limited by the interests of the community; in order to achieve rational land use, to increase national production and to establish equitable social and economic relationships among members of the community, the law may impose obligations and restrictions on the private ownership of land (art. 32).

319. According to Cameroon's Ordonnance N74-1 of 6 July 1974, the State is the guardian of all lands. It may in this capacity intervene to ensure rational use of land or in the imperative interest of defence or the economic policies of the nation. 54/

320. It may also be noted that, according to the 1991 Annual Report of the Inter-American Commission on Human Rights, agrarian reform law was adopted by the Nicaraguan legal authorities which affected the system of agricultural land tenure. Laws stipulating the confiscation of undercapitalized firms were also passed. 55/

321. The Moroccan legislature laid down the modalities for expropriation in the public interest in the *dahir* of 3 April 1951, amended and supplemented by several subsequent legal texts. Under article 1 of that text, "expropriation in the public interest shall be operated by judicial authority". Article 2 stipulates that "the courts may pronounce an expropriation only where the public interest thereof has been declared and the procedure laid down in this *dahir* has been followed". Legislation also emphasizes that the collective lands (cultivated and pasture lands) have communal tenure and that these lands are inalienable, not detachable and indefeasible.

322. The legislation of most countries on the exercise of the right to land use also assume the possibilities of nationalization, expropriation, requisition or compulsory purchase of land for public benefits or other purposes. As a rule, such legislation provides for just compensation.

323. A few replies drew attention to the topic of land and its function for human development consistent with the interests of the society as a whole. In this connection reference was made to the necessity of giving access to land to poor or other underprivileged groups as a fundamental requirement of meeting their social needs more effectively. Other information stressed the urgency of respecting and protecting indigenous peoples' systems of land tenure.

D. The right to adequate housing

324. In its General Comment No. 4 (sixth session, 1991), concerning the right to adequate housing (art. 11 (1) of the Covenant), the Committee on Economic, Social and Cultural Rights has recommended that State parties, *inter alia*, take steps, either alone or on the basis of international cooperation, to ascertain the full extent of homelessness and inadequate housing within their jurisdiction. Measures designed to improve housing may reflect whatever mix of public and private sector measures considered appropriate. The promotion by States parties of "enabling strategies", combined with a full commitment to obligations under the right to adequate housing, should thus be encouraged. In other words, the measures being taken are sufficient to realize this right for every individual in the shortest possible time in accordance with the maximum of available resources. Finally, the Committee has recommended that States parties, both recipients and providers, should ensure that a substantial proportion of financing is devoted to creating conditions leading to a higher number of persons being adequately housed.

325. The independent Expert will not try to take up this question in detail, taking into account the working paper and progress report on the right to adequate housing prepared by Mr. Rajindar Sachar, Expert of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in accordance with its resolution 1991/26 of 29 August 1991 and its resolution 1992/26 of 27 August 1992. 56/

326. Nevertheless, it may be noted that special attention by Governments should be paid to the adoption and strengthening of national legislation on the implementation of adequate housing; to the elimination of racial discrimination in the housing sphere concerning minorities, the landless, the unemployed, migrant workers, refugees, indigenous communities, the elderly, the ill and other vulnerable groups; to the legal responsibility of the local authorities to protect citizens from exploitation by landlords, including harassment of tenants and threatened or actual eviction; to the improvement of health and environmental conditions; to rendering assistance to people facing natural and man-made disasters; to the elaboration of special programmes and conditions at national and local levels for the reduction and elimination of homelessness, etc.

327. In his working paper, Mr. Sachar pointed out that the right to adequate housing is constitutionally recognized in at least 30 States and that all States maintain policies and legislation directly affecting the denial or, more positively, the realization of the right to adequate housing.

328. Several Governments indicated practical measures or programmes employed in the realization of the right to housing. For instance, the Constitution of Portugal provides for the State to encourage the establishment of housing cooperatives and to promote private individual construction. 57/ The Government of Morocco reported that a *dahir* of 2 June 1915, embodying the land-tenure code, regulated real property.

329. Finally, it may be mentioned that even in such a developed country as the United States, between 3 and 5 million people are homeless in the presence of thousands of vacant apartments and houses. 58/ In another developed country, Japan, some labour union leaders continue to argue that Japanese workers, even being paid the world's highest nominal wages, live in extremely poor housing conditions. The improvement in housing conditions does not necessarily mean that there are no housing problems to be solved. The first problem is that houses are on the whole expensive to purchase, and second is that there is a disparity in living standards. On the other hand, land prices have jumped 270-fold from 1950 to 1984. That is why residents with an average income in 17 prefectures cannot buy an individual house, due to similar circumstances, but residents of 6 prefectures in rural areas can pay back housing loans with 20 per cent of their disposable income. 59/

E. Tendency to reduce State-owned property and transfer it to private hands

330. The question of reduction of State-owned property and its transfer to private hands is closely connected with privatization in some market economies and in the Eastern European countries.

331. Clarifying basic property rights can, in fact, be accomplished through denationalizing all non-private assets with a view to quickly entrusting user rights to agents in charge of privatization. Needless to say, even in the few societies where at the outset of the transition there was such a consensus, efforts to re-establish property rights have quickly become mired in the politization of the transformation processes.

332. At the height of the political revolution in the economies in transition, many of the new policy makers and their advisers assumed that the establishment of clear property rights and the privatization of State-owned assets could be accomplished very quickly, chiefly in a technocratic fashion. This view was also held by the majority of foreign advisers, including those from regional and international organizations.

333. Since the early 1980s, there has been a wave of wholesale divestment of State assets in market economies. The experience of France, Italy, the United Kingdom and other countries could be relevant to the privatization campaigns in the Eastern countries.

334. In this connection, two questions can usefully be posed with a view to deriving inferences for the policy options that Eastern policy makers face: first, What were the motivations and the goals envisaged for these privatizations? and second, How successful have these policies been in terms of the goals set? The answer to the first question can shed light on whether the goals now envisaged in the East overlap with those of market economies. The investigation of the second question can suggest useful lessons for the East's privatization campaigns as well as for a tendency to reduce State-owned property and transfer it to private hands of wide strata of population.

335. Among the many motives for privatization in market economies the following are crucial: improving the use of scarce resources; plugging budget deficits and seeking budgetary relief by curtailment of the role of the State; ideological precepts claiming that freedom and liberty necessitate private ownership and for those reasons the role of the State has to be compressed to the bare essentials; and breaking up entrenched trade-union (or similar group) privileges that inhibited resource reallocation. 60/

336. The privatization is also carried out in developing countries which often received technical advice and funding from the World Bank. However, the conditions for receiving such assistance sometimes are not suitable for those countries. The official Peruvian newspaper El Peruano of 15 December 1992 reported, for example, that in December 1992 the Bank had approved a credit of $30 million at 7.6 per cent annual interest for Peru to finance technical assistance for a programme of privatization. Nevertheless, this credit would only be available once Peru has repaid its outstanding debts to the World Bank.

337. Property rights reform and reduction of State-owned property or privatization are two core components of transformation policies in the Eastern European countries. They are usually lumped together. Property rights reforms has several dimensions. One includes questions revolving around the assignment of property rights associated with existing assets. Another aspect is the assignment and guarantee of property rights to assets created from public and private savings.

338. The basic philosophy of free distribution is that once restrictions and perhaps other claims are settled, the remaining State assets are common property and should, therefore, be distributed free of charge. The merits of various forms of free distribution have been debated at great length as a matter of State policy first in Czechoslovakia and more in Poland. 61/ Czechoslovakia initially envisaged sharing out virtually all State assets coming under large-scale privatization through such a scheme. But the scale of the project that is now in the process of being introduced there, as well as in Poland, is much less ambitious. This form of divestment has since been explored in other countries too. The first elements of a voucher scheme are, for example, in place of Lithuania. Such a scheme is also being actively debated in Albania, Belarus, Estonia, the Russian Federation, Slovenia and the Ukraine.

339. Service, Justice and Peace in Latin America has pointed out that in the Latin American countries the tendency of Governments to transfer State property into private hands, particularly transnational corporations, jeopardizes national sovereignty.

340. Finally, it should be noted that the independent Expert has not received appropriate information from Governments on the privatization programmes of State-owned property by individuals, cooperatives, private companies, etc.

F. Examination of levels of taxation, income distribution, the role of the State in providing for the right to own property

341. The independent Expert has not received any information relating to the examination of levels of taxation, income distribution, the role of the State in general in providing for infrastructure and other elements of the right to own property.

G. The right to own property and the principle of non-discrimination

342. The formal recognition of the right to own property is not enough to ensure its full enjoyment. To achieve this goal, a number of related rights must also be recognized and exercised, and adequate opportunities for the enjoyment of all human rights must be provided.

343. Nevertheless, the Argentine authorities informed him that the restriction on private ownership constituted by the exercise of the State's power of taxation may only be imposed by Congress. This is, in fact, the attitude taken by most States.

344. Most States stressed in their information that national constitutions and other legislation on the right to own property provided for the equality of everyone irrespective of his national origin, race, sex, language, religion, political or other belief, education, social background, income and other individual characteristics. Therefore equal opportunity as to acquiring property is granted. The legislation of several countries also imposes some restrictions on the right to own property.

1. Distinction between nationals and foreigners in relation to the enjoyment of this right

345. Human rights and fundamental freedoms in the Universal Declaration of Human Rights constitute "a common standard of achievement for all peoples and all nations". A common standard, based on common agreement among nations, has guided States in their treatment of aliens, reinforced by the provisions of bilateral treaties, based on the principle of reciprocity. 62/

346. Decisions of international courts and customary international law have long recognized the right of the alien whose property is expropriated by the State to prompt, full and effective compensation. For those States which still recognize the right of individual ownership of movable and immovable property, this rule would still apply. 63/

347. Contemporary enforceable international instruments and bilateral agreements all recognize the principle of the right of foreigners to acquire and own movable and immovable property.

348. A series of treaties of friendship and trade between the United States of America and other States contain a statement of the principle of protection of acquired property. "Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for the public benefit and in accordance with due process of law, nor shall it be taken without just compensation." 64/ It may be stipulated that national treatment is to be the minimum, combined with most-favoured-nation treatment, or further, that property shall be protected "in no case less than that required by international law". 65/ Treatment accorded to nationals is not always considered to be sufficient but is the minimum to which an alien has a right.

349. The transfer of assets abroad is of particular importance to the alien, who may wish to send part of his earnings and/or savings to his home country. Transfer of earnings comprises an important source of foreign currency and income for countries of emigration. Refugees and stateless persons have an enforceable right to transfer their assets to a country of resettlement. 66/

350. It may be noted that all States parties to the European Convention of Human Rights and the First Protocol thereto accepted the principle that taking the property of foreigners entailed a requirement to pay compensation. It was confirmed by the Committee of Ministers in a resolution adopted prior to the signing of the agreed text of Protocol I. In this resolution the Committee stated that: "... as regards article 1, the general principles of international law in their present connotation entail the obligation to pay compensation to non-nationals in the case of expropriation" (resolution 52/1 of 20 March 1952).

351. The relevant legislation of Western European States had provided for compensation in all post-war nationalizations in States parties. That was in turn confirmed by cases considered by the European Commission on Human Rights and the European Court. 67/

352. It may be noted that in the replies of some countries, the constitutional position and the legislation itself indicated the positive attitude towards foreigners in relation to the enjoyment of the right to own property. In Senegal, the principle of non-discrimination is strictly observed in regard to the right to own property: foreigners, even non-residents, may own property.

353. The Swedish Constitution contains provisions on guarantee of compensation for anyone who loses his property on the basis laid down in law. A foreigner in Sweden shall be on an equal footing with the Swedish citizen in this respect.

354. In Iraq, ownership by foreigners is permitted by law, subject to the principle of reciprocity, but is restricted to ownership of a dwelling and business premises.

355. The Supreme Court of Argentina has ruled that the term "inhabitants", used in article 14 of the Constitution, encompasses both Argentines and aliens, and refers to persons residing in the territory of the Republic with the intention of remaining there, in other words, persons who are living there although they have not set up a domicile with all its legal effects.

356. In Saudi Arabia, the private ownership of property by non-citizens is not practised under Saudi Arabian legislation, as in many other countries.

357. It is important to note in this connection that international law recognizes as a general principle of the right to own property that compensation must be paid in all circumstances when the private property of citizens or foreigners is taken by the State. Further, it must also be recognized that the principle of less-than-full but just compensation is accepted in the legal systems of developed country democracies. It should also be added that there were developed States, particularly like the United States, whose national laws or constitutions have been interpreted specifically to prescribe full compensation in all cases of property taking, including that of foreigners. However, even taking this into account, one cannot conclude that there is enough evidence of a general principle of municipal law that full compensation is payable in all circumstances of property taking. 68/

358. Thus, full compensation has been arrived at by a variety of methods, depending on a variety of factors, including the nature of the property or interests taken and other circumstances relating to the property taken.

2. Distinction between men and women in relation to the enjoyment of this right

359. While States accept the fundamental principle of justice and equality for all, enunciated in the Charter of the United Nations and other international instruments, the reality is that women by and large do not yet enjoy equal status. Notwithstanding the fact that there is a growing awareness that the role of women is changing and should change, only a few countries have yet come fully to grips with the problem or are ready to be able to embark upon new avenues. Though the active participation of women in the economic and social sectors of national life has to a greater or lesser extent been

accepted, the fact nevertheless remains that it is limited and restricted in many ways, including the exercise of the right to own property. There are three basic facts which seem to emerge: that in the vast majority of countries - both developed and developing - women's role is still limited and leaves room for expansion; that there is a general trend towards a more active participation of women in the economic and social life of their countries; and that society is groping for ways and means to cope with this situation and for new patterns to fit the changing roles of men and women.

360. In many parts of the world, increasing numbers of women find themselves in an ambivalent position: on the one hand, their active participation in the economic and social life of their countries is stimulated, while on the other hand, it is subject in practice to limitations and discrimination.

361. The following is a very brief summary of the current situation in some countries as reflected in the replies of Governments and other sources used by the independent Expert.

362. According to the information received from the Government of the United States it was stated that although the United States enjoys a well-developed (yet still evolving) set of rules governing property rights, it recognizes that such rights are not universally recognized. In some developing countries, for example, property rights exist for men but not for women. Women work in the markets and fields along with men but cannot invest their earnings as men do. If a woman does put her money in a bank the men in her family are free to withdraw it without the woman's consent. Without secure property rights, there is little incentive for people to work hard and to save and invest. 69/

363. Inheritance laws existing in India today vary primarily by religion (Hindu, Muslim, Christian and Parsee) and among the Christians also by region. The Hindu law of property goes back historically to the classical Indian legal treaties. According to this law, for example, women did not inherit immovable property such as land (although they may receive it as a gift) and at best enjoyed a life interest in ancestral property under specific circumstances.

364. Islamic law by contrast did legally recognize a woman's right to ancestral property, including immovables, although not equal to men's. At the same time, in relation to agricultural land, in most States Islamic law was superseded by regionally prevailing customary law under which women were typically excluded. In the Punjab, for instance, under customary law, the widow, mother and even daughter were excluded by male agnates and often by near male collaterals as well.

365. It should also be noted that there was a crucial overlap between women having direct access to land rights, and not just rights mediated via male members and their children's economic and social well-being.

366. However, customarily, barring a few matrilineal communities in north-east and south-west India, and exceptional circumstances (for example, the absence of male heirs) elsewhere, women in most communities had virtually no recognized inheritance rights to immovable property. The rights did not always extend to inheritance in land (for example, among the Garos, land was

communal property); and where it did so extend, did not usually include a right to control or to alienate. Women having usufructuary rights to land was somewhat more common, but mainly confined to tribal (matrilineal or other) communities. Also, the rights, whether of inheritance or use, were usually conditional on or associated with specific rules of marriage and residence. 70/ Modern legislation, especially since independence of India has given women of most communities individual right to own, use and dispose of land and other immovable property, but as yet not on an equal basis with men. And in most communities social conditions are far from conducive to women claiming their legal share in their parental or marital homes, or functioning as independent farmers. 71/

367. In large parts of South Asia, traditional rules of inheritance have typically favoured men in Pakistan, Bangladesh, Sri Lanka and India. Ethnic, cultural and religious differences superimposed on ecological and agricultural ones have produced distinct variations across regions and communities in the customary system of inheritance, marriage, residence patterns, land use, and the gender division of labour. The legal systems operating, for example, in Sri Lanka today reflect some of these cross-community differences. There are four separate systems in existence in relation to property and inheritance rights: the Kandyan law, the Tasawalamai or Tamil customary law, the Muslim law and General Law which is an amalgam of Roman-Dutch and English law and applies to all those who do not fall within the purview of any of the above. 72/

368. Unlike the other laws existing in Sri Lanka, under Islamic law women have an in-built disadvantage in that their share is always legally less than that of men with an equivalent relationship with the deceased. However, Muslim women can dispose of their property as they want without seeking the husband's permission. 73/

369. The Civil Code of Egypt provides that the statutes of Egyptian law, one of whose sources is the Islamic shariah, shall apply to the state of marriage and its consequences, including financial consequences.

370. The statutes establish that the financial liability of spouses shall be separate, contrary to comparable practices in other States which treat the financial liability of spouses as a single liability, while authorizing one member of the couple to choose alternative financial treatment, whether this be the dowry system or the amalgamation of their liabilities. As a result of the establishment by the Islamic shariah of the principle of separation between the financial liabilities of spouses, the right of either one of them to own property, to make use of such property, to administer it and to decide as to its disposal is treated separately.

371. The technical principles of Islamic law establish the responsibility of women from the religious and secular point of view, and women and men are, in that respect, equal. It is implicit in women's responsibility, which is independent of that of men, that they should have the reward of what they have earned, including the right of ownership, without sharing it with their husbands. According to shariah, a woman of full legal age has free disposal

of all her property with respect to donations and commutation, and her husband has no entitlement to it and has no right of restraint over her in her disposition of all or part of such property.

372. The principles of Islamic shariah accord protection to the wife's right of ownership of her bridal trousseau and, although it goes to the conjugal dwelling, her right of ownership in it is safeguarded and it is held in trust by the husband and may not be encroached upon. These principles have been applied in the judgements of the Court of Cassation. 74/

373. Some States also reported on their legislation concerning the equal property rights of men and women. For instance, Madagascar stated that Malagasy law imposes no restrictions on the exercise of the right to own property by women, since women are regarded as full citizens enjoying all rights and subject to the fundamental duties of the citizen. This is true regardless of marital status, since women are entitled to possess, manage and administer, sell, purchase or give away personal property without hindrance. While the Constitution of 1987, based on socialist principles, established the right to personal property, which is limited as to its extent and exercise, this right is in all cases subordinated to the economic and social needs of the community. Nor is it an absolute right, although it may have been so in the past. 75/

374. The Government of Yugoslavia also informed the independent Expert that Yugoslav law makes no distinction regarding the possibility of acquiring and possessing property rights by men and women who are equal in every respect. Otherwise, the marital property regime recognizes personal property and specific common property acquired during life and work together (the so-called marital acquisition) that is regulated by a specific legal regime and, subject to the principle of equality and established criteria, can be divided during marriage or after its dissolution.

375. The Governments of Iraq and Somalia have reported that no distinction is made between men and women. In particular, a married woman may act in her full civil capacity, just like her husband. Her rights and capacity are limited only by the provisions relating to the matrimonial regime.

376. In accordance with the Family Code of Bolivia, "the common property shall be assigned to satisfy the needs of the spouses and to the maintenance and education of the children"; and that the common property shall be administered "by both spouses". In this regard, the provisions governing joint ownership of property held in community by husband and wife may also be applied. 76/

377. Regarding the information from Morocco on the right of married women to ownership, they have, as the Code of Personal Status and of Successions states, complete freedom to administer and dispose of their goods without any control by the husband who has no power over his wife's goods.

378. Unfortunately, the lack of appropriate information from States and other materials on the legal status of women in all geographical regions and their status in possessing property rights did not permit the independent Expert to elucidate this question completely. This issue is still awaiting more profound and wider study.

3. Recognition in the constitution and other legal acts of the property rights of indigenous peoples

379. On the recommendation of the Economic and Social Council, in its decision 1990/248 of 25 May 1990, the General Assembly, in its resolution 45/164 of 18 December 1990, proclaimed 1993 as International Year for the World's Indigenous People, with a view to strengthening international cooperation for the solution of problems faced by indigenous communities in areas such as human rights, the environment, development, education and health. The General Assembly invited States, organizations of indigenous people and other interested non-governmental organizations to consider the contributions they can make to the success of the Year.

380. In proclaiming 1993 the International Year for the World's Indigenous People, the General Assembly also suggested that United Nations bodies consider the specific programmes which will significantly benefit 300 million indigenous people.

381. The independent Expert agrees with the conclusions of the Meeting of Experts held in Nuuk (Greenland, 24-28 September 1991) that self-government, self-administration and self-management of indigenous peoples constitute elements of political autonomy and that the realization of this right should not pose a threat to the territorial integrity of the State.

382. It is felt that the following conclusions of that meeting are relevant to the present study:

> "Indigenous territory and the resources it contains are essential to the physical, cultural and spiritual existence of indigenous peoples and to the construction and effective exercise of indigenous autonomy and self-government. This territorial and resource base must be guaranteed to these peoples for their subsistence and the ongoing development of indigenous societies and cultures. Where appropriate the foregoing should not be interpreted as restricting the development of self-governing and self-management arrangements not tied to indigenous territory and resources.
>
> "Subject to the freely expressed desire of the indigenous peoples concerned, autonomy and self-government include, *inter alia*, jurisdiction over or active and effective participation in decision-making on matters concerning their land, resources, environment, development, justice, education, information, communications, culture, religion, health, housing, social welfare, trade, traditional economic systems, including hunting, fishing, herding, trapping and gathering, and other economic and management activities, applicable, to levy taxes for financing these functions. 77/

383. Those and other conclusions of the Meeting of Experts correspond with the provisions of the international instruments in the field of human rights as well as resolutions and decisions adopted by the General Assembly, the Commission on Human Rights and other United Nations bodies.

384. In this connection it may be recalled that the goals in strengthening the role of indigenous peoples are contained in the Indigenous and Tribal Peoples Convention No. 169 of the International Labour Organisation (ILO) and are incorporated into the draft universal declaration on the right of indigenous peoples prepared by the United Nations Working Group on Indigenous Populations of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

385. In the light of these requirements, Governments should incorporate, in collaboration with the indigenous peoples affected, the rights and responsibilities of indigenous peoples in national legal frameworks, including recognition of the need to protect traditional habitats from unsustainable and inequitable development, and secure their access to and control over both traditional lands and natural resources.

386. It is symptomatic that of four countries to ratify the ILO Convention No. 169 at this time, three (Bolivia, Colombia and Mexico) are in Latin America. Several Latin American Governments have already requested technical assistance from ILO in order to revise their legislation on indigenous land and resource rights. In some countries, moreover, government policies and programmes have been adopted in full consultation with indigenous peoples' organizations.

387. New policies, as noted, are most evident in the Amazon region. In the highland areas of Mexico, Central America and the Andes, where the majority of Latin American Indians reside, there have been few signs of agrarian reform or successful integrated rural development programmes, either to make more land available to the indigenous communities, or to enable them to increase their agricultural production and productivity. 78/

388. In more recent times, national laws and policies have continued to recognize the existence of separate indigenous communities in areas of peasant agriculture, as inalienable and imprescriptible lands, and in certain cases to provide for their increase under agrarian reform programmes. This was the case in the Colombian agrarian reform laws of 1961 and 1968, the Peruvian Law of 1969 and the Ecuadorean Law of 1973.

389. One country where indigenous organizations have already had an impact in highland regions is Ecuador. Here there has been significant indigenous mobilization since the early 1980s, in the highland and Amazon regions alike. The number of registered comunas (legally recognized since 1937) increased markedly during the 1980s, as did the land controlled by them. But in recent years petitions for more communal land formulated under provisions of the 1973 Agrarian Reform Law have stalled as the Government has claimed that no further land is available for distribution. In June 1990, indigenous organizations carried out land invasions throughout the highland region, at the same time providing the Government with demands for more effective land reform implementation.

390. Many Latin American countries now have special legislation relating to forest-dwellers and the lands they occupy. This trend can be dated to the 1960s. But in some countries, notably Bolivia and Ecuador, it was only in

the 1980s that Governments began to adopt special legislation in this area. Before then, there was no distinction in law and practice between land rights in forest regions and other areas of the country. 79/

391. Service, Peace and Justice in Latin America (SERPAJAL) suggested the need to emphasize that indigenous peoples have from time immemorial preserved the forests and the environment on account of their particular culture, and to mention that, notwithstanding existing legislation in a number of countries, such as Brazil, to halt the forward march of settlements in the Amazon region, the settlers press ahead destroying mankind's heritage.

392. Colombia's new 1991 Constitution is now the first in the world to articulate the concept of territorial rights for indigenous peoples, and to spell out in considerable detail the nature of indigenous rights to self-government and to management of their natural resources. Indigenous territories are recognized as territorial entities, on an equal footing with departments, districts and municipal areas. All territorial entities are to enjoy autonomy for the management of their internal affairs, including the rights to govern themselves with their own authorities, to administer resources and establish the taxes necessary for carrying out their duties.

393. In Bolivia, events have also been moving fast since the end of the 1980s. In this country land rights in all regions have until recently been governed by the 1953 Agrarian Reform Law which, while providing for communal forms of ownership, has been most applicable to highland regions. In any event, the majority of lowland Indian communities had been unable to secure collective title to their lands, owing to the complexity of the administrative procedures involved. In conformity with the Bolivian Agrarian Reform Law "property of indigenous communities shall be inalienable, except in the cases to be established in special regulations. Ownership of such property shall give rise to all the rights and obligations pertaining to individually-owned and cooperatively-owned farms." This law also indicates that "landless rural inhabitants living in an indigenous community without being members thereof and working for the owners of the lands shall be entitled to a part of the uncultivated land, the size of which shall not exceed that of the average parcel owned by a family of the newcomer category". 80/

394. According to the Guatemalan Constitution, the Indians enjoy full protection (arts. 57 and 66 to 70) which ensures respect for their cultural identity, protection of ethnic groups, and of the land belonging to their farm cooperatives and the indigenous communities. But the actual experience of the Guatemalan Indians is often one of removal from their traditional habitat and their forced resettlement in so-called development communities which, in fact, indicates non-observance of the law and the constitutional provisions governing the matter. 81/

395. Despite the difficulties the trend towards the recognition of the rights of indigenous peoples over their lands and resources, sometimes involving control over resource management, it is now firmly established through Latin America. It has provided a framework in which intergovernmental and non-governmental organizations can build programmes of legal assistance, and

also innovative programmes of sustainable resources management. Some recent approaches of this kind will be reviewed below focusing on activities of some international organizations.

396. Throughout Asia, the policy environment of recognizing special rights for indigenous and tribal peoples over forest or agricultural lands or for according them a significant degree of control over resources management appears to be far less favourable than in Latin America as a whole. It is only in the Philippines that recent constitutional law and current policies appears to be based on the principles that now enjoy support in some Latin American countries, and in any way to embrace the concept of territorial rights for indigenous minorities. There are either countries, including Bangladesh, India and Pakistan in South Asia, and Malaysia in South-East Asia, which recognize a special legal status for tribals, including some separate rights of land ownership or use. But the implications of this special status, for the nature and extent of land rights, can vary from one part of the country to another. One key question, a source of considerable debate today in many Asian countries, is the extent to which lands and resources can be held and managed in accordance with the customary law of these peoples, and the manner in which customary law can be reconciled with national statutory laws.

397. FAO draws attention to the principles adopted by the World Conference on Agrarian Reform and Rural Development (Rome, 1979) and the primacy of social equity. FAO also emphasized the importance of the collective rights to rural property. Particular attention was given to the customary land rights vested in local groups and the need for the United Nations system to establish principles and machineries to enforce and preserve those rights. In view of 1993 being the International Year for the World's Indigenous People, these issues, as stated by FAO, may gain momentum and be highlighted as a priority in United Nations programmes.

398. It may be underlined that the main question is to find and guarantee effective ways and means of enabling socially and economically disadvantaged people to have access to different forms of legal property ownership, including its private, communal and State forms. Relevant national policy has to take into account in the development of these ways and means distribution and redistribution policies, as well as land and other social and economic reforms. It should be emphasized that respect for the right of everyone to own property entails the elimination of all forms of discrimination against specific social groups.

V. RESTRICTIONS AND LIMITATIONS CONCERNING THE RIGHT TO OWN PROPERTY

A. Recognition of the fact that the right to own property is not absolute

399. As a rule, the right to own property is recognized in international and national laws. Appropriate information on this matter has already been described by the independent Expert in previous chapters of this report.

400. Nevertheless, the private, communal, state or social forms of property may be restricted or limited by the Government within existing provisions of national laws and in conformity with international standards in the field of human rights.

401. In this connection it should be noted that the general principles of international law required the payment of prompt, adequate and effective compensation in respect of the expropriation (restriction) of all types of property.

402. Article 21 of the American Convention on Human Rights of 1969 says, for instance, that "everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest and in the cases and according to the forms established by law". 82/

403. The same provisions are contained also in article 1 of the Protocol I to the European Convention for the Protection of Human Rights and Fundamental Freedoms, namely:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." 83/

404. From the standpoint of their legal content, it is possible to distinguish three different types of restriction on property rights: non facere (a mere prohibition which is simply a ban on doing certain things with the property); pati (which signifies the obligation to allow others to use the property for certain purposes), and facere (which signifies an obligation to do something, such as, for example, the obligation to build on an uncultivated urban plot). 84/

405. With this in mind, four major categories of restriction on property rights can be enumerated:

(a) Normal restrictions on property rights (those stemming from the legal definition itself);

(b) Restrictions on the exercise of the right (for example, restrictions stemming from administrative policy);

(c) Administrative servitudes, whereby some of the entitlements of ownership are transferred to the administration, although ownership itself is preserved, and

(d) Obligation to perform certain acts.

406. In view of the purpose of restrictions and servitudes, a distinction should be made between those which seek to satisfy the interests of society and which are imposed on behalf of the community and those that seek to defend other private rights and interests.

407. In conformity with the replies received by the independent Expert from Governments and previous information submitted by them to the Centre for Human Rights, the restrictions and limitations existing in the legislation of some States are described in the following paragraphs.

1. General regulations in the interest of public welfare, security and health which the State may adopt

408. The Government of the United States of America states that it is important to note that the Government may always taken private property for public use, so long as it pays just compensation to the former owner. The general measure of just compensation is the fair market value of the property taken.

409. State and local private property protection: in the United States Federal system, the regulation of private property rights falls chiefly to State and local governments. As a result, the laws pertaining to the acquisition, use, and disposition of property vary from location to location. The common law developed and applied by State and local courts also figures prominently in this field. In general, however, all jurisdictions within the United States recognize and protect the right of individuals to own property alone and in association with others.

410. Article 16 of the Constitution of Luxembourg provides that "No one may be deprived of his property save on grounds of public interest, in the cases and in the form prescribed by law, and in consideration of just and prior compensation". Article 544 of the Civil Code defines ownership as "the right to enjoy and to dispose of property in absolute freedom, provided such use is not prohibited by law;".

411. The Constitution protects the ownership of property, as a sacred and inviolable right against seizure by the public authorities, just as the Civil Code and the Criminal Code protect that right against violation by private individuals. However, in its definition of ownership, article 544 of the Civil Code reserves the right of the State, through its laws and regulations, to restrict the use of property in the general interest of society. This covers the instance of expropriation in the public weal, as being justified by the general interest of society. The text of the

Constitution itself and the specific legislation set forth the substantive and formal requirements under which a citizen may be deprived of his property in the public weal. Finally, it should be noted that the Constitution imposes no ban on the special confiscation of certain property that has been involved in an offence against the law."

412. The Chinese authorities report that China afforded equal protection to individually, collectively and publicly (State) owned property. At the same time, citizens' individual property rights are subject to limitations. (1) They are limited by the rights and interests of society and the public. Hence the State may, in the public interest, subject to the statutory procedure make requisition of citizens' individually owned property against payment. (2) They are subject to limitations in connection with the security of the State and society. Hence the State may lawfully forbid citizens the right to own individually acquired military equipment, and may lawfully confiscate criminally or unlawfully owned property. (3) They are subject to public health limitations. Hence individual citizens must not use their property to pollute the environment or damage the ecosystem, or to endanger the health and lives of the public. (4) They are also subject to limitations relating to the rights of others. Hence, an individual citizen must not abuse his ownership of property to encroach upon or breach the rights and interests of others. To protect the ownership of property by citizens and bodies corporate, Chinese law also imposes limitations on the actions of State administrative authorities.

413. The Italian Government reports that property is by tradition a perpetual right. The limits referred to in article 832 may be of a public or private nature and may concern either the right to enjoy property or the right to dispose thereof. Among the public restrictions on the right to enjoy property, attention should be drawn to the imposition of a public servitude (e.g. non-aedificandi) or requisition; among the restrictions that affect the right to dispose of property, attention should be drawn to the obligations governing the transfer of goods of recognized historical or artistic value. The category of private restrictions that affect the right to enjoy property includes the prohibitions contained in articles 833 and 844 of the Civil Code as well as any measures relating to legal pre-emption.

414. These restrictions may derive from a law or from administrative provisions. No obligations that curtail the right to own property may be imposed without adequate compensation. Pursuant to article 834 of the Civil Code, "No one may be deprived in full or in part of his property, except for reasons of public interest, declared in accordance with the law, and against payment of adequate compensation".

415. Provisions relating to expropriation for reasons of public interest shall be determined by special laws. Expropriation is permissible even in the absence of specific ad hoc provisions, once there are reasons of public interest, as regulated by fundamental laws.

416. Expropriation must comply with the following conditions: (a) there must be a declaration of public interest; (b) the property to be expropriated must be identified; (c) adequate compensation must be paid (see Constitution, art. 23). The existence of reasons of "public interest" is differentiated

from the provision contained in Act No. 2359 of 25 June 1865, which subjects expropriation to the execution of work of public interest. Legal doctrine has clarified that the existence of public interest is the essential prerequisite for expropriation, with the exception of certain special provisions contained in special acts. Any expropriation for a purpose other than that provided for by law or of property other than as determined by law shall not be considered lawful.

417. Compensation need not necessarily correspond to the injury suffered by the person concerned, although it must constitute proper indemnification: none of the principles contained in special acts authorizes purely token compensation.

418. The Government of Portugal stated, "Some kinds of goods may be removed from the sphere of private property - as is the case for the means of production, land and natural resources where this is justified by the public interest" (arts. 80, subpara. c, of the Constitution) - and rules may exist which limit freedom of hereditary transfer (art. 2024 et seq. of the Civil Code) or provide for preferential rights (see art. 1117 of the Civil Code).

419. The right to own private property is thus subject to limitations established by law, which are referred to in several articles of the Constitution.

420. In the United Kingdom "the right of ownership is one of the oldest rights known to law. Every person has the right to use and dispose of his own property, subject only to the overriding interest of the community as a whole. Appropriation by the State is only possible with the authority of an Act of Parliament or an order under an Act; this may take the form of taxation (for meeting the expenses of government), nationalization (of certain industries and services vital to the public welfare), or requisition or compulsory purchase of land, fixed equipment and buildings (for such public purposes as housing, health, education, road building, defence, postal and telephone services, public utility undertakings, civil aviation, open spaces, distribution of industry and the redevelopment of decayed and badly planned areas)".

421. In accordance with the Turkish Constitution of 1982, everyone has the right to own and inherit property. These rights may be limited by law only in view of the public interest. The exercise of the right to own property shall not be in contravention of the public interest (art. 35).

422. The Swedish Government reported that according to the Instrument of Government Chapter 2, Section 18, "every citizen whose property is requisitioned by means of an expropriation order or by any other such disposition shall be guaranteed compensation for his loss on the bases laid down in law". A foreigner in Sweden shall be on an equal footing with a Swedish citizen in this respect (Chapter 2, Section 20, first para., ninth item).

423. The Egyptian Constitution includes provisions for the protection of this right. Article 34 states that "private property shall be safeguarded and may not be sequestered other than in cases specified by law and by means of a judicial decision. It may not be expropriated other than for the public good and against compensation in accordance with the law ...". Article 35 states that "nationalization of such property shall not be permitted other than for considerations of public interest, in accordance with the law and against compensation". Article 36 prohibits confiscation other than by a judicial decision.

424. The Government of Yugoslavia reported that "there are no quality or quantity restrictions regarding acquisition of private property except in rare cases where such restrictions are stipulated by the Constitution and law (natural resources, not including agricultural land, can be only State property; quantity restrictions regarding the ownership of woods and woodland). The Constitution of the Federal Republic of Yugoslavia provides for the possibility of determining the property rights on certain assets (woods, woodland, construction land, certain assets in public use) and the exercise of property rights on real estate more precisely by law, so that it is possible to provide for certain restrictions on property rights in these cases".

425. The Supreme Court of Argentina has taken the view that the concept of ownership is a relative right in that "all the rights established by the Constitution are subject, as regards their exercise and forms, to the rules and limitations essential for the social order and the common good, the basis of every individual right and hence anterior and superior to them".

426. The information provided by the Government of Mexico indicates that in Mexico the right to own property is not absolute. It is circumscribed and determined by a number of restrictions which make it substantially varied in nature. By introducing restrictions and variants, civil law points to a system for the protection of the interests of other property owners, as individuals, or of the general or public interest.

427. The restrictions imposed for the purpose of public order or on the grounds of public interest are apparent in the expropriation procedure. Thus the State intervenes in private property by taking it over for the benefit of the general interest, in accordance with article 836 of the Civil Code, and in conjunction with article 27 of the Constitution, the relevant part of which stipulates that "The nation shall at all times be entitled to impose on private property such measures as are dictated by the public interest ...".

428. In particular, articles 1 to 28 of the Constitution of the United Mexican States, together with the relevant enabling acts, guarantee public welfare, security and health. Hence, "the nation at all times shall be entitled to impose on private property such measures as are dictated by the public interest, and to regulate for the benefit of society the use of natural resources open to appropriation, in order equitably to distribute public wealth, ensure its conservation, achieve balanced development of the country and improvement of the living conditions of the rural and urban populations ...".

429. Thus, the Government of Mexico carries out expropriations for reasons of public interest, and with proper compensation, to develop the infrastructure, schools, hospitals and other social welfare undertakings.

430. In Venezuela the right of all the inhabitants of the Republic to own property is guaranteed by article 99 of the Constitution, which stipulates that on account of its social function, property shall be subject to such levies, restrictions and obligations as are established by law for reasons of public or general interest. Consequently, the right to own property is recognized as a general principle, although the requirement is that this right must fulfil a social function, which is why the law may, for reasons of public or general interest, impose levies, restrictions or obligations. Thus, the right to own property is not unrestricted; it must conform to the needs or interest of the community.

431. Article 101 of the Constitution provides for the expropriation of any type of property with the requirement that expropriation may only be ordered for reasons of public or social interest and with the proviso that a final order must have been issues and fair compensation paid. The same norm also stipulates that when moveable property is expropriated for agrarian reform purposes or to allow the expansion and improvement of urban areas, as well as when ordered by law for overriding reasons of national interest, payment may be deferred for a specified period or the property expropriated may be paid for in part by the issue of bonds with compulsory acceptance and with an adequate guarantee.

432. FAO notes that rights to own property are not absolute, and would like to add that they could be reversible. In addition, property rights acquired through personal accumulation of means of production may be viewed differently from those acquired through social accumulation.

2. Limitations deriving from the State's exclusive powers

433. As far as this specific question is concerned, the independent Expert would like to draw attention to the information received from two States: Colombia and Mexico. The Constitution of Colombia (art. 31) is intended to protect economic freedom in view of the illicit manipulation of the supply of or demand for goods and services in which an individual could become involved. In other words, it prohibits the existence of private monopolies which transform their holders into controllers of production and sales, but it admits the temporary operation of the so-called "natural" monopolies, i.e. those which arise from inventions or improvements. The only monopolies authorized by the Constitution are those established by law to increase State revenues. Any business or industry deemed to be an official monopoly and therefore prohibited from operating is entitled to indemnification.

434. Finally, attention is drawn to articles 39 and 48 of the Constitution which establish, respectively, that the law may restrict the production and consumption of liquor and fermented beverages and that the Government alone is entitled to import, manufacture and possess arms and ammunition.

435. Mexican legislation emphasizes, for instance, that private property is principally subject to two distinct types of restriction: expropriation for reasons of public interest and such forms of ownership as are dictated by public interest.

436. The requirements affecting private property are set out in article 27, paragraph 3, in the following terms: "The nation shall at all times be entitled to impose on private property such measures as are dictated by the public interest ...".

437. Such measures represent the right of the State to change the nature or form adopted by the three attributes of property (uti, fruti and abuti), in accordance with the requirements of public interest. Generally speaking, it may be said that the measures entail restrictions or limitations temporarily imposed on the owner to use, enjoy and dispose of any of his property.

438. Capacity to acquire private property is also regulated by article 27 of the Constitution, and paragraph I of the article stipulates:

> "Only Mexicans by birth or naturalization and Mexican companies may acquire ownership of land, water and relictions or obtain concessions to operate mines or waters. The State may grant the same right to foreigners, provided they undertake before the Ministry of Foreign Affairs to consider themselves as Mexican nationals with regard to such property and not to invoke in respect thereof the protection of their Governments; the penalty for breach of such an undertaking shall be loss of the property, for the benefit of the nation. On no account may foreigners acquire direct ownership of land or water within a 100-kilometre limit of the borders or within a 50-kilometre limit of the shores".

3. Death duty

439. The independent Expert received information from the Mexican authorities, from which the following is reproduced:

As far as the conveyance of private property by succession is concerned, the Civil Code stipulates as follows:

> "Art. 1281. Inheritance is taken to mean succession to all the property of a deceased person as well as to all his rights and obligations with the exception of those which cease upon his death.
>
> "Art. 1282. Inheritance is deferred by the will of the testator or by legal provision. The first of these is testamentary succession, the second is inheritance by operation of the law.
>
> "Art. 1288. Upon the death of the person owning the estate, the heirs shall be entitled to the estate as joint property, until it has been divided.

> "Art. 1305. All persons except those specifically prohibited by law from doing so shall be entitled to make a will.
>
> "Art. 1313. All inhabitants of the Federal District, regardless of age, shall be entitled to inherit and may on no grounds be deprived of their inheritance; however, in the case of certain individuals and certain types of property, this right may not apply on the following grounds."

4. Confiscation of property belonging to persons who commit offences

440. Information received from Mexico states:

Mexican law provides for the seizure of property whose owners commit offences. In this connection, article 22, paragraphs 1 and 2, of the Constitution stipulates:

> "The following penalties shall be prohibited: mutilation and infamy, branding, whipping, beating, any form of torture, an excessive fine, confiscation of property and any other unusual or exceptional penalty. Total or partial seizure of a person's property by the judicial authorities in order to meet any civil liability owing to the commission of an offence, or in order to pay taxes or fines, shall not be considered confiscation of property."

441. It should be mentioned that an individual's property may be seized only in accordance with the procedure laid down by the Constitution, i.e. to meet a fiscal claim. Seizure must be ordered by a judicial authority, as the administrative authority may only impose a fine or arrest for a period of not more than 36 hours, after substantiation of due process.

442. The penalties and security measures provided for in article 24 of the Penal Code for the Federal District and for the Republic include seizure of the instruments, objects and proceeds of an offence.

5. Confiscation of or limitation on property belonging to nationals of enemy powers in time of war

443. The Constitution of Panama declares in article 7 that in the event of war, serious disturbance of public order or urgent social interest, when prompt action is required, the executive branch may decree the expropriation or occupation of private property.

> "Where restitution of the object occupied is feasible, the occupation shall be only for the duration of the circumstances that gave rise to it.
>
> "The State shall in every case be responsible for any expropriation so carried out by the executive branch and for the losses and damage caused by the occupation, and shall pay the amount thereof once the reason for the expropriation or occupation has ceased to exist."

444. In the information received from Mexico, it was stated that the principles of the Constitution clearly indicate the desire of the legislature to provide the inhabitants of the Republic, without distinction, such essential legal security as is necessary for them to lead their lives in harmony. However, it clearly stipulates that such for the individual security may be overridden in order to protect the collective interest, in which case the interests of the individual may be affected without this constituting a violation of the human rights.

445. From the above it may easily be inferred that, if it is occasionally necessary to restrict the interests of the individual in time of peace for reasons of public interest, in time of war such restrictions are essential, as the very existence of the State depends on them.

446. Furthermore, if restrictions on individuals during wartime are fully justified by the need to safeguard the existence of the State, there is all the more justification for restricting the interests of nationals of an enemy State, who, in the absence of proof to the contrary, must be considered enemies, as for obvious reasons their duty lies with their country, which they will endeavour to support during a war. There will thus will be a permanent threat of them using their material resources to provide such support.

447. In the event of an invasion, a serious disturbance affecting public order or any other disturbance that gives rise to a serious threat or to conflict within society, the President of the United Mexican States may alone decide, by agreement with the Ministers of State, the heads of administrative departments and the Attorney-General of the Nation, and with the approval of Congress, or if Congress is not sitting, of the Standing Commission, to suspend in all or part of Mexico such guarantees as may hinder prompt and unimpeded restoration of order; however, he may do so only for a limited period of time, by means of general measures and without the suspension being directed against a particular individual.

448. The Argentine authorities have informed the independent Expert that during the conflict between Argentina and the United Kingdom in the South Atlantic, on 19 May 1982 the Government of Argentina adopted Act No. 22,591 declaring the non-disposability of all property existing in the territory of Argentina or in places subject to its jurisdiction owned by the United Kingdom of Great Britain and Northern Ireland, the British Crown, British subjects not permanently resident in Argentina, persons of another nationality resident in the United Kingdom or any undertaking or entity directly or indirectly controlled by them. "Non-disposability meant, for the owners of the property, their representative or dependants or any other person, that they were not allowed to dispose of the property by any title or to grant acts or contracts which would diminish the worth of the property or its productive capacity or entail the removal of any asset outside national jurisdiction; it did not cover operations undertaken as part of the normal activity of persons, undertakings or entities".

6. Expropriation

449. Many States informed the independent Expert that expropriation in their countries was permitted only in the public utility or social interest and that the citizens may, in accordance with the rules and procedures prescribed by law, challenge the expropriation before an administrative court, and the amount of compensation before a regular court. The Governments of Germany, Portugal and Turkey, for instance, reported that expropriation may be effected only on the basis of a law that also regulated the compensation. The Turkish authorities also reported that in determining the amount of compensation, the law shall take into account tax declarations, estimates of value established by official assessment at the time of expropriation, unit prices of real estate and calculations of construction costs, and other objective criteria. The law shall determine how the difference between this amount and the value declared to the fiscal authorities shall be taxed. Compensation shall be paid in cash and in advance.

450. The legislation of Cuba also authorizes the expropriation of property for reasons of public benefit or in the interests of society, subject to due compensation. The law establishes the procedure for expropriation and the basis on which the need for and usefulness of this action are to be determined, as well as the form of compensation, taking into account the interests and the economic and social needs of the person whose property is to be expropriated.

451. In this connection, the Penal Code provides for an offence against the right of ownership, in establishing that: "Any public official who orders the expropriation of a person's property or entitlements without legal authorization, or without complying with the formalities, shall be punished by loss of freedom for from three months to one year and/or a fine of 100 to 300 units of assessment".

452. Article 17 of the Argentine Constitution states that expropriation for reasons of public utility must be defined by law and is subject to prior compensation. Prior compensation covers the objective value and damage directly or immediately consequent upon the expropriation, but does not include loss of earnings or sentimental value. Value is assessed by an ad hoc tribunal.

453. The information received from the Government of Mexico states the following:

> Expropriation is an act whereby the public administration acting on legal grounds, deprives individuals of their movable or immovable property or of a right on grounds of social interest, need or utility. The right of expropriation is provided for in a number of paragraphs of article 27 of the Constitution: paragraph 2 states that "expropriation may only be performed for reasons of public interest and against compensation"; the second paragraph of article 27, section VI, adds that "Federal and State laws shall determine, in their respective jurisdictions, those cases in which private property may be taken over in the public interest." The same article lays down the general rules for setting prices and compensation.

454. The report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, describes so called "ethnic cleansing" directed against Muslims and ethnic Croatians in the territories of Bosnia and Herzegovina and Croatia under the control of ethnic Serbs.

455. The Special Rapporteur indicates that the detention of civilians is clearly being used as a method of pressuring them to leave their houses and territory. Discrimination, harassment and maltreatment of ethnic Serbs are also serious and widespread problems in Croatia. These practices have resulted in the flight of a large number of ethnic Serbs to Serbia and to those parts of Croatia and Bosnia and Herzegovina under the control of ethnic Serbs. 85/

B. Limitations on the action of State

456. In view of the social nature of property, its component attributes are weakened and its absoluteness can, to some extent, be violated. This meant, as Costa Rica stated, that if the sacred nature of property, which implied that it had a superior hierarchical position within the legal order or constituted a first class right, was modified and, on the contrary, property was deemed to be a legal rule that had been enacted and not conferred by natural law, the concept became less absolute and the legal order could thus admit limitations.

457. It is generally recognized that a State has a right to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. It is important that those regulatory powers of the State should not result in seizure of property without compensation and in "arbitrary" or "illegal" seizure.

458. The legislation of many States and provisions of international treaties provide that no one shall be deprived of his possessions except "for public purpose" or "in the public interest". They also provide that the guaranteed rights may only be interfered with by a State "subject to the conditions provided by law" and this is intended as a guarantee against arbitrariness on the part of the State. More precise interpretation of those terms still awaits interpretation and clarification in the case law.

459. The study of the cases considered by the European Commission and the Court allowed us to conclude that both the Commission and the Court were giving to States wide powers to "control the use of property". 86/

460. It is usually held that when a parliament elected by the people, operating within democratic principle of accountability, decides after careful debate to take certain measures of nationalization or expropriation of property, it is very difficult for an international tribunal or a national court to offer the view that the proposals are not in the public interest.

461. The nationals and foreigners remain in different positions vis-à-vis the State that decides to take their property. It is explained thus: "Beneficial as nationalization may ultimately prove to be to a State and its citizens,

there is little to justify placing the burden of a State's economic experimentation upon the shoulders of the foreign investor, who has neither any voice in the decision to indulge in such experimentation, nor any status to enjoy whatever benefits may ultimately be derived therefrom". 87/

462. As pointed out in previous chapters, the provisions of constitutions and other legislations of many States are intended to protect ownership against any infringement thereof. To protect the ownership of property by citizens and bodies corporate, Chinese law imposes limitations on the actions of State administrative authorities. The law states that individual factories and businesses, private enterprises, and enterprises incorporating foreign investment will not be nationalized, and authorizes their long-term existence. It prohibits the expropriation of property without payment or not in accordance with statutory procedure: if the State does expropriate an individual's property on the grounds of imperative public interest, the law stipulates that the statutory procedure must be followed, and suitable payment must be made. If a State administrative authority acts in an improper fashion, a citizen may bring an action under the Administrative Suits Act, requesting the People's Courts to protect his property.

463. The Civil Code of Egypt provides that "no one may be deprived of his property other than in the cases and in the manner provided for by the law and against fair compensation". Besides being intended to protect private property against administrative interference, the legislation provides for protection against arbitrary action by individuals.

464. The judgements given by the Egyptian Court of Cassation have successively consolidated both the former and latter concepts establishing the right of individuals to own property and safeguarding that right against infringement. The Court has ruled:

(a) That anyone who owns land becomes its owner and of all that is above and below it;

(b) That the owner of any thing is alone entitled to use, enjoy and dispose of it, within the limits of the law;

(c) That an action in respect of entitlement brought by an owner with a view to recovering his property from the party which has usurped it shall not be subject to any limitation. The right of ownership shall be a permanent right, which does not lapse as a result of lack of use. A claim made by the owner for the value of immovable property which has been usurped shall be regarded as a claim obliging the usurper to fulfil his commitment to make amends by means of compensation if he is unable to restore the property in kind. Restoration in kind is the essential premise and shall be replaced by cash compensation only if restoration in kind is impossible. Accordingly, an action to claim the value of immovable property which has been usurped shall not be subject to limitation.

465. In the view of Egypt, the greatest threat to individual ownership of property is its forcible seizure by the Administration, drawing upon those means of execution which individuals are unable to contest. Accordingly, the first means which the law establishes to protect private property against

arbitrary action by the Administration is that of restricting the State's authority to infringe upon the private property of individuals. The law declares such restriction to be legitimate in article 508 of the Civil Code, as follows:

(a) Removal of property from its owner shall be based on a provision in law; the law does not permit such removal other than in promotion of the public interest;

(b) In cases of expropriation of property for the public good, the Administration shall follow the procedure laid down by the law, i.e. after observing the procedures laid down by the Law concerning expropriation of property for the public good;

(c) Fair compensation shall be paid to the owner in respect of the forfeiture of his property. The law concerning expropriation lays down the measures which ensure the assessment of fair compensation for the owner if his assessment of such compensation differs from that of the Administration.

466. Mexico stated that, with the exception of those cases in which property is seized in connection with an offence, the State may deprive individuals of their property only in the circumstances indicated above and in accordance with the appropriate procedure. This principle is enshrined in the Constitution in the second and first paragraphs of articles 14 and 16 respectively of which stipulate as follows:

> "Article 14 ...
>
> "No one may be deprived of life, liberty or of his possessions or rights, save by means of legal proceedings in previously established courts, in compliance with due process of law and in accordance with previously existing law."
>
> "Article 16. No one's privacy, family, domicile, documents or possessions may be interfered with, except by virtue of a written order from the competent authorities, which shall set out the grounds and legal basis for the procedure ...".

In accordance with the above, property may not be "unlawfully or arbitrarily seized", as this would imply a violation of the safeguards of the individual.

467. In addition, the National Commission on Human Rights, whose prime function is to ensure compliance with the legal norms that embody the human rights contained in the Mexican Constitution was established by a Presidential Decree of 6 June 1990.

468. In 1991 the Hungarian Parliament adopted a special "Law XXV on partial compensation for damages unlawfully caused by the State to properties owned by citizens in the interest of setting ownership relations", in which provided compensation for Hungarian citizens when actionable injury was incurred, persons who had been aggrieved in connection with deprivation of their

Hungarian citizenship, etc. This "partial compensation is due to natural persons whose private property has been aggrieved by application of regulations which were enacted following 1 May 1939. The measure of compensation may not exceed 5,0 MLN forints per property owned and per former owner". 88/

469. The Turkish Constitution provides that: "ARTICLE 46: The State and public corporations shall be entitled, whenever the public interest so requires, to expropriate privately owned real estate holdings wholly or in part or to impose administrative servitudes thereon, in accordance with the rules and procedures prescribed by law, provided that compensation is paid in advance.

"Compensation shall be paid in cash and in advance. However, the method of payment of sums due for land expropriated pursuant to the implementation of agrarian reform, large-scale energy and irrigation projects and projects for housing, afforestation, the protection of coastal areas and the building of tourist facilities shall be prescribed by law. In such cases, the law may allow payment in instalments, but the payment period shall not exceed five years; payment shall be made in equal instalments, and the portion not paid in advance shall bear interest at the highest rate provided for interest on the public debt.

"Compensation for land expropriated from small farmers who cultivate their own land shall, in all cases, be paid in advance." The Fifth Amendment to the United States Constitution provides in the pertinent part that "Private property (shall not be) taken for public use, without just compensation". This provision implicitly recognizes the right of individuals to own property and protects private property owners against uncompensated deprivations of their property by the Federal Government. The United States Supreme Court has held that by virtue of the Fourteenth Amendment to the Constitution, the same prohibition against uncompensated takings also applies to state and local governments. Courts will generally find that a taking of property has occurred where the Government assumes title to privately held property, physically occupies private property for any substantial time, or sufficiently impedes upon the exercise of individual property rights through certain types of regulation. In this regard, courts have declared certain zoning ordinances and other forms of governmental regulation to have sufficiently infringed upon such rights, thereby triggering the obligation to pay just compensation.

470. In the United Kingdom of Great Britain and Northern Ireland, appropriation by the State is only possible with the authority of an Act of Parliament or an order under an Act. Compensation is paid for losses suffered through nationalization, requisition or compulsory purchase, or the deterioration of property as a result of activities of public authorities. Deliberate or reckless damage of someone else's property and unlawful gain at the expense of another - whether by theft, robbery, deception, blackmail, handling stolen goods or forgery - are criminal offences. The criminal courts have power to make a compensation order against a convicted defendant. Alternatively, the victim may recover compensation for loss or damage in civil proceedings.

471. Fair compensation is provided by the legislation of Bolivia, Canada, Germany, Portugal, the United States of America and some other States whose legislation was available to the Expert. In those States such compensation is intended to make good the loss that the natural or legal person has suffered by reason of requisition or expropriation.

472. It may be concluded that no other right is subject to more qualifications and limitations in order to allow the State to act in the general interest, to prevent discrimination or abuse of property or to promote a just and equitable distribution of wealth than the right to own property. Clearly, time and again, a balance has to be struck between the individual interest, on the one hand, and the interests of society, on the other hand.

CONCLUSIONS

473. The right to own property as a means of contributing to economic and social development and to the enjoyment of human rights and fundamental freedoms is an extremely complex question that touches upon a wide spectrum of activities and relationships with other human rights. The right to own property is an essential basis of the economic system of any given society.

474. The basic right of the individual to own property and develop it to its full economic potential may be regarded as an essential human right and a fundamental freedom. Democracy itself is based on the principle of the moral integrity of the individual and the belief that society should be regulated by individual choice and decision-making.

475. This right is regarded as an individual and collective one and the basic laws and other legislation of many States recognize the right to own property as both a legal institution and a basic right. However, given the enormous variety of forms of property and their social importance, it is extremely difficult to establish a universal human right to individual private property in terms that one can substantiate as requiring incorporation in the national law of all States and capable of being given the same weight to in domestic courts.

476. The right to own property, especially economically productive property, emancipated the individual from the State, making Government an obedient servant of the people. It has had profound political, economic and social effects in the development of the State. Civil liberties such as freedom of speech, participation in government, worship and assembly flourished in a society that respected property rights. Respect for the right to own property was thus essential for the development of legal, economic, social and cultural institutions in which persons participated freely and without discrimination and where other fundamental rights and freedoms were protected.

477. The sense of security and dignity gained from being able to own property is an essential prerequisite for the pursuit of happiness and exercise of a variety of other human rights. The right to own property is related to all other human rights and fundamental freedoms.

478. The private right to intellectual property spurs creative and inventive activity, without which scientific and industrial research, artistic and literary endeavours, would be stifled. International law and national legislation guarantee both the right of the creator to his moral and material interests and the right of the community to participate in its cultural life and to share in scientific advancement and its benefits. It is important to balance the two, to safeguard the one for the realization of the other.

479. The majority of States have declared their commitment to the principle of full recognition and protection of all types of property, including private property. However, there is no such phenomenon as absolute private ownership of productive property in any known economic system. Limitations have been

imposed by law in the light of the requirements of public utility, security or health. "Democratization" of property should promote a more just and equitable distribution of wealth.

480. By means of private property, man has sought fulfilment with some liberty and security. He has sought to acquire the economic means whereby he may develop his personality. In this respect, the existence of such property to cover the needs of the individual and those of his family, as well as to meet certain contingencies, such as illness, inability to work, and others has gained acceptance.

481. The use of private property has facilitated the concentration of the means of production in the hands of a few as well as unlimited accumulation of wealth by a small number. This is the root cause of a deep class division between the owners of enormous amounts of property and a huge mass of people who own nothing.

482. Concentration of large tracts of land in the hands of privileged groups has produced the phenomenon of the large estate (latifundio). To remedy this situation and on the basis of the doctrine of the social function of property, agrarian reform programmes have been undertaken, although their results have so far been fairly modest.

483. Collective property has to some extent mitigated these drawbacks. Nowadays, collective property is almost universally accepted and is also recognized as an important factor in the economic and social development of States.

484. The private use of property is also regulated, to a greater or lesser degree, by the State by the range of permissible uses of property and by the sharing of its value or product, through taxation, considered by the State as a means to ensure that property satisfies its social functions.

485. Taxation may not entail excessive transfer of wealth to the State, which would extinguish the guarantee to which property is entitled, i.e. that government levies may not be of a confiscatory nature.

486. According to the legislation of the majority of States no one may be deprived of his/her property except in the public interest, legally proven, on the payment of due compensation in compliance with the law.

487. The right to housing must be considered as a fundamental human need and its lack must be seen as an injustice.

488. There is nowadays a strong trend towards State reform, and consequently towards reducing - or even eliminating - State property. Frequent recommendations by international agencies advocate the reorganization of the State, principally through the privatization of State enterprises. However, the State would maintain a form of participation in the privatized enterprises in order to ensure that property serves its proper social function.

489. Historical and recent experience confirm that as long as there is a war and as a result gross violations of human rights, there cannot be proper respect for the right to own property.

490. The right to own property, if legally and fully protected, benefits the international community as well. Individuals would trade and invest abroad when they were sure that Governments of other countries would not expropriate their assets without just compensation, and would respect their right to make private economic decisions. The future of the developing and ex-socialist countries depends on full respect for property rights throughout the world, in every Member State and across all international boundaries.

RECOMMENDATIONS

491. The independent Expert considers this completed final report as a modest contribution to a broader process of activities of the General Assembly and the Commission on Human Rights in this field.

492. It would be advisable that any mechanism of consideration of this issue should not be at the expense of the effective functioning of other areas of the human rights system, especially at a time of considerable financial constraints.

493. Therefore, it seems to be appropriate to retain this question as an agenda item of the General Assembly and the Commission on Human Rights and to consider in more detail basic aspects of this issue, preferably on a biennial basis.

494. There is a need to maintain the clear link between the right to own property, the right to adequate housing and other relevant human rights during consideration of the realization of economic, social and cultural rights.

495. The Committee on the Elimination of Racial Discrimination should pay particular attention to the measures aimed at inadmissibility of discrimination in the matter of the right to own property. In his respect, due regard should be given to consider seriously the communications alleging violations of the rights contained in article 5 (d)(v) of the Convention on the Elimination of All Forms of Racial Discrimination.

496. The Committee on the Elimination of Discrimination against Women should consider adopting a concise statement or assessment concerning the discrimination faced by women in many countries regarding the exercise of their right to own property. Special attention should be paid to methods aimed at eradicating such discrimination.

497. The independent Expert is in favour of developing other regional mechanisms similar to that established under the European Convention of Human Rights and the First Protocol thereto.

498. There is a need to systematize or even to create a case law/jurisprudence database, containing compilations of the relevant data, decisions and views of international, regional and national bodies.

499. The continuing property rights reforms in ex-socialist States and some developing countries should be supported and assisted. In the course of these reforms, States should ensure that socially disadvantaged groups do not suffer disproportionately from the measures employed.

500. The convening of a seminar on the ensuring of the right to own property in one of the Eastern European countries would be advisable.

501. It is also important that States declare their commitment at the universal level to the principle concerning full recognition and protection of all types of property, including private property.